Supreme Court, U.S.
FILED

No. 95 181

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IN THE

SUPREME COURT OF THE UNITED STATES

UNION UNDERWEAR COMPANY, INC., d/b/a FRUIT OF THE LOOM - - - - Petitioner

versus

MARY KAY SCEARCE; THOMAS A. DOCKER, Administrative Law Judge; and WORKER'S COMPENSATION BOARD - Respondents

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Kentucky's Workers' Compensation Statute, Ky. Rev. Stat. Ann. § 342.0011 (Michie/Bobbs-Merrill 1993 & Supp. 1994) *et.seq.* establishes an adversarial trial-type system for deciding Workers' Compensation claims. Ky. Rev. Stat. Ann. § 342.033 (Michie/Bobbs Merrill 1993 & Supp. 1994) provides that a party may introduce medical testimony through a written medical report as an alternative to deposition testimony and further provides that in the event a party elects to introduce medical proof by way of medical report, the adverse party may cross-examine the witness. Kentucky's highest Court has held that the party wishing to cross-examine a witness whose medical report has been introduced must bear the burden of scheduling the witness's deposition and must bear all costs associated with the deposition, including the cost of reporting and transcribing the deposition and the fees of the witness. The question presented is whether this system deprives the party wishing to cross-examine an adverse witness of its property without due process of law; all of the highest courts of the States who have examined the issue have held that such a system violates due process requirements.

PARTIES

The names of all parties to the proceedings below appear in the caption. Union Underwear Company, Inc., d/b/a Fruit of the Loom has no subsidiaries that are not wholly owned. The parent company of Union Underwear Company, Inc., d/b/a Fruit of the Loom is Fruit of the Loom, Inc., a New York corporation.

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PETITION FOR A WRIT OF CERTIORARI

REPORTS OF OPINIONS BELOW

The only published report of any opinions rendered in this case is the Opinion of the Kentucky Supreme Court which is reported as *Union Underwear Co., Inc.* v. *Scearce*, 896 S.W.2d 7 (Ky. 1995).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment or decree sought to be reviewed is dated February 16, 1995. (Appendix, p. 1a). The Order denying a Petition for Rehearing is dated May 11, 1995. (Appendix, p. 30a).

Jurisdiction to review the judgment or decree in question by writ of certiorari exists pursuant to 28 U.S.C.S. §1257 (Law. Co-op. 1988) and 28 U.S.C.S. §2101 (Law Co-op. 1992).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

U.S. Const. Amend. XIV §1 states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ky. Rev. Stat. Ann. §342.033 (Michie/Bobbs Merrill 1993 & Supp. 1994), which became effective October 26, 1987, states:

> In a claim for benefits, no party may introduce direct testimony from more than two (2) physicians without prior consent from the administrative law judge. The motion requesting additional testimony shall clearly demonstrate the need for such additional testimony. A party may introduce direct testimony from a physician through a written medical report. The report shall become a part of the evidentiary record, subject to the right of an adverse party to object to the admissibility of the report and to cross-examine the reporting physician. The commissioner shall promulgate administrative regulations prescribing the format and content of written medical reports.

STATEMENT OF THE CASE

I.

OVERVIEW OF THE KENTUCKY WORKERS' COMPENSATION SYSTEM

Kentucky's first attempt at enacting a system of compensating injured workers outside the traditional common law tort arena came with the enactment of a Workers' Compensation law in 1914. 1914 Ky. Acts Ch. 73. Although this first attempt was struck down as violative of

the Kentucky Constitution in *Kentucky State Journal Co.* v. *Workmen's Compensation Board*, 170 S.W. 1166 (Ky. 1914) *mod.* 172 S.W. 674 (Ky. 1914), the ensuing session of the legislature cured the constitutional defect by enacting 1916 Ky. Acts Ch. 33 §102. The reason the original Workers' Compensation Act was struck down by the Kentucky High Court was that the Act was mandatorily applicable to employees and, therefore, violated Ky. Const. § 54 which prohibits the General Assembly, Kentucky's legislative body, from enacting any law which limits the amount to be recovered for injury or death. The 1916 modification which allowed the Act to pass constitutional muster made coverage of employees optional in that employees may elect not to be covered by the act. One important feature of the Act which has remained until the present day, however, is that employers, such as Fruit of the Loom, may not elect to be exempted from the Act. Employers are mandatorily subject to the provisions of the Act.[1] Thus, an injured employee is able to opt out of coverage by the Workers' Compensation Act and pursue an action against the employer in the court of general jurisdiction, where the right of cross-examination undoubtedly pertains. The employer, however, has no such option and is mandatorily bound by the procedures applicable under the Act.

Since the initial enactment of a Workers' Compensation law in Kentucky the amendments to the system from both a substantive and a procedural standpoint have been numerous. One aspect of the system that is important to this case has not changed in the years since 1916, however: Kentucky's Workers' Compensation cases have always been decided by an adversarial litigation process. The following discussion establishes the adversarial trial-type nature of the present system.

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[1] Ky. Rev. Stat. Ann. §342.630 (Michie/Bobbs Merrill 1993 & Supp. 1994).

Proceedings in Workers' Compensation cases in Kentucky are governed by the Workers' Compensation Act, Ky. Rev. Stat. Ann. §§342.0011 *et.seq.*, (Michie/Bobbs-Merrill 1993 & Supp. 1994) as well as a detailed system of regulatory procedures which appear at 803 Ky. Admin. Regs. 25:010[2] and which the Commissioner of the Department of Workers' Claims adopted pursuant to statutory authority granted by Ky. Rev. Stat. Ann. §342.260 (Michie/Bobbs-Merrill 1993 & Supp. 1994).[3]

In the event the parties are unable to agree as to compensation, either party may file an "Application for Adjustment of Claim" on forms provided by the Commissioner.[4] These forms parallel a complaint which might be filed in an ordinary civil action and contain blank spaces for the statement of the prima facie elements of a claim. In almost all cases (including the instant case) it is the employee seeking an award of benefits who files the Application. Only attorneys licensed to practice in Kentucky may practice workers' compensation cases, except

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[2] The most recent version of the rules of procedure have not yet been codified. These rules are published in Ky. Admin. Reg. Vol. 21 No. 12 beginning at p. 3032.

[3] The Kentucky Workers' Compensation Act was extensively amended by legislation which became effective April 4, 1994. These amendments restructured the Department of Workers' Claims. Pursuant to this restructuring, the procedural framework was amended to conform to statutory changes by virtue of regulations which became effective July 5, 1995. References in this Petition will be to statutes and regulations currently in effect unless otherwise stated. Ky. Rev. Stat. Ann. §342.033 (Michie/Bobbs-Merrill 1993 & Supp. 1994) was not amended by the 1994 session of the General Assembly and contains the same language which was in effect throughout the litigation of this case: the statute remains in effect to this day.

[4] The Commissioner has adopted different forms for claims involving injuries, occupational diseases, and retraining incentive benefits (a particular benefit available to workers who have contracted coal workers' pneumoconiosis).

that a natural person may appear *pro se*.[5] The employer is given the option of filing responsive pleadings[6] and must affirmatively and timely plead certain special defenses, which are those defenses which would constitute an affirmative defense in an ordinary civil action.[7] Provision is made in the regulations for awarding interlocutory relief in the form of medical benefits, income benefits, and rehabilitation benefits.[8]

In the event interlocutory relief is not requested or is denied, the Commissioner enters a scheduling order which allows all parties 60 days within which to take proof, followed by a period of 30 days for the defendant to take proof, followed by 15 days for presentation of rebuttal proof.[9]

Ky. Rev. Stat. Ann. §342.033 (Michie/Bobbs-Merrill 1993 & Supp. 1994), the statute which bears most directly on this appeal, provides:

> In a claim for benefits, no party may introduce direct testimony from more than two (2) physicians without prior consent from the administrative law judge. The motion requesting additional testimony shall clearly demonstrate the need for such additional testimony. *A party may introduce direct testimony from a physician through a written medical report. The report shall become a part of the evidentiary record, subject to the right of an adverse party to object to the admissibility of the report and to cross-examine the reporting physician.* The commissioner shall promulgate administrative regulations prescribing the format and content of written medical reports. (Emphasis added).

The Commissioner has adopted regulations which prescribe the content of the reports and expressly provide that

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[5] 803 Ky. Admin. Regs. 25:010 § 20.

[6] 803 Ky. Admin. Regs. 25:010 § 5(2).

[7] 803 Ky. Admin. Regs. 25:010 § 1(8).

[8] 803 Ky. Admin. Regs. 25:010 § 10.

[9] 803 Ky. Admin. Regs. 25:010 § 5(3).

a party wishing to cross-examine a medical witness must do so at its own expense. 803 Ky. Admin. Regs. 25:010 § 14.[10] This Statute was enacted effective October 26, 1987. Prior to that time, all medical proof introduced by the parties was taken by deposition. Thus, the right of cross-examination was available to the cross-examining party as in any other adversarial proceeding.

After the parties have introduced their proof, a prehearing conference is held during which the parties are required to stipulate uncontested facts and settlement of the case is discussed.[11] Witness lists and exhibit lists must be exchanged before the prehearing conference.[12] If the case is not settled, a formal hearing is held before the Administrative Law Judge.[13] The Administrative Law Judge[14] then renders a decision which must include findings of fact and rulings of law.[15] If there are "errors patently appearing on the face of the award" either party may petition the Administrative Law Judge for reconsideration of the decision within 14 days from the effective date of the decision.[16]

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[10] Neither the statute nor the regulations promulgated thereunder indicate what grounds for objecting to a medical report are appropriate.

[11] Ky. Rev. Stat. Ann. §342.270(3) (Michie/Bobbs-Merrill 1993 & Supp. 1994).

[12] 803 Ky. Admin. Regs. 25:010 § 8.

[13] Ky. Rev. Stat. Ann. §342.275 (Michie/Bobbs-Merrill 1993 & Supp. 1994) and 803 Ky. Admin. Regs. 25:010 § 11.

[14] Administrative Law Judges are required to be attorneys licensed to practice in Kentucky and are required to have five years' experience in practicing workers' compensation law in Kentucky or extensive knowledge of Kentucky workers' compensation law. Ky. Rev. Stat. Ann. §342.230(3) (Michie/Bobbs-Merrill 1993 & Supp. 1994).

[15] Ky. Rev. Stat. Ann. §342.281 (Michie/Bobbs-Merrill 1993 & Supp. 1994).

[16] Ky. Rev. Stat. Ann. §342.275 (Michie/Bobbs-Merrill 1993 & Supp. 1994) and 803 Ky. Admin. Regs. 25:010 § 12.

A party aggrieved by the decision of the Administrative Law Judge may file an appeal to the Workers' Compensation Board within 30 days after the Administrative Law Judge's decision becomes final.[17] The Workers' Compensation Board consists of three individuals who must possess all of the qualifications of appellate court judges except residency requirements.[18] Review by the Workers' Compensation Board is limited to a review of the record before the Administrative Law Judge; no hearing *de novo* is allowed.[19] A detailed set of regulations has been promulgated to govern appeals to the Workers' Compensation Board.[20]

A decision of the Workers' Compensation Board is subject to review by the Kentucky Court of Appeals, which is Kentucky's intermediate appellate court. Review is by way of a Petition for Review which must be filed not more than 30 days after the effective date of the Workers' Compensation Board's decision.[21] Like the review by the Workers' Compensation Board, the review by the Court of Appeals is not *de novo*.[22] In fact, the Kentucky Supreme Court, Kentucky's court of last resort, has held in *Western Baptist Hospital* v. *Kelly*, 827 S.W.2d 685 (Ky. 1992) that review by the Kentucky Court of Appeals is limited:

> The function of further review of the WCB in the Court of Appeals is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.

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[17] Ky. Rev. Stat. Ann. §342.285 (Michie/Bobbs-Merrill 1993 & Supp. 1994).

[18] Ky. Rev. Stat. Ann. §342.215(3) (Michie/Bobbs-Merrill 1993 & Supp. 1994).

[19] Ky. Rev. Stat. Ann. §342.285 (Michie/Bobbs-Merrill 1993 & Supp. 1994).

[20] 803 Ky. Admin. Regs. 25:010 § 13.

[21] Ky. Rules Civ. Pro. 76.25.

[22] Ky. Rev. Stat. Ann. §342.290 (Michie/Bobbs-Merrill 1993 & Supp. 1994).

The final step in the process of appellate review is an appeal to the Kentucky Supreme Court which may be taken as a matter of right.[23] The Kentucky Supreme Court has also limited the scope of appellate issues that it will consider by stating in *Kelly* that:

> The function of further review in our Court is to address new or novel questions of statutory construction, or to reconsider precedent when such appears necessary, or to review a question of constitutional magnitude.

Thus, it is apparent that at no step along the road of appellate procedure is an aggrieved party entitled to *de novo* review of the initial decision of the Administrative Law Judge and that at no point in the proceedings is a party able to introduce proof beyond that introduced before the Administrative Law Judge.[24] In other words, the fact-finding process is completed when the case leaves the Administrative Law Judge so that there is no opportunity to cross-examine witnesses after that point.

II.

SUMMARY OF PROCEEDINGS BELOW

The Respondent, Mary Kay Scearce, (hereinafter Scearce) filed her claim for workers' compensation benefits on July 30, 1990. (Appendix, p. 31a). On September 5, 1990 a scheduling order was entered which assigned the case to an Administrative Law Judge and allowed the parties time within which to conduct discovery and take proof.

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[23] *Vessels v. Brown-Forman Distillers Corp.*, 793 S.W.2d 795 (Ky. 1990).

[24] There is one minor exception to this rule: in the event of allegations of fraud in an appeal to the Workers' Compensation Board, the Board shall schedule a hearing. 803 Ky. Admin. Regs. 25:010 § 12(5).

Scearce elected to employ the provisions of Ky. Rev. Stat. Ann. §342.033 (Michie/Bobbs-Merrill 1993 & Supp. 1994) and introduced all of her medical proof by medical report. Under date of October 31, 1990 Scearce filed a Motion[25] seeking admission of the August 31, 1990 medical report of Dr. Oris Aaron as evidence. (Appendix, p. 40a). Under date of November 2, 1990, Fruit of the Loom objected to the introduction of Dr. Aaron's report unless Scearce was required to produce the witness for cross-examination, citing cases which are hereinafter discussed for the proposition that to allow the introduction of proof by way of medical report without requiring the proponent to produce the witness for cross-examination violates the prohibition against taking property without due process of law contained in the U.S. Const. Amend. XIV (See Appendix, p. 42a). The Administrative Law Judge, by Order dated November 16, 1990, admitted the report of Dr. Aaron as evidence, but refused to require Scearce to produce the witness for cross-examination. (Appendix, p. 51a). Similarly, Scearce requested by Motion that the medical report of Dr. Narashimha Reddy dated November 13, 1990 be filed as evidence; this Motion was dated November 19, 1990. (Appendix, p. 53a). Scearce also requested admission as evidence of Dr. Kenneth DeSimone's report dated November 12, 1990. (Appendix, p. 71a). Fruit of the Loom, by pleadings dated November 28, 1990, similarly objected to the introduction of these two medical reports without the production of the witnesses for cross-examination. (Appendix, pp. 61a, 80a). The report of Dr. Reddy was ac-

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[25] At the time the motion was filed, the applicable regulations required that a motion be filed seeking introduction of a report as evidence pursuant to KRS 342.033. At the present time, a motion is not necessary. The proponent of such a medical report simply files the report in the record and the report becomes evidence unless the opponent makes formal objection.

cepted as evidence by the Administrative Law Judge's Order dated December 4, 1990 (Appendix, p. 70a) and the report of Dr. DeSimone was admitted as evidence by Order dated December 6, 1990. (Appendix, p. 89a). Neither of these orders admitting medical reports as evidence required Scearce to produce the authors of those reports for cross-examination.

The case proceeded to decision by the Administrative Law Judge pursuant to the procedures outlined above in Section I of the Statement of the Case. The Final Hearing was held on February 7, 1991 and briefs were filed. The decision of the Administrative Law Judge was rendered on February 7, 1992, one year after the Final Hearing. (Appendix, p. 8a). An examination of the February 7, 1992 Opinion, Award and Order, and the Amended Order dated March 25, 1992 which was entered in response to Fruit of the Loom's Petition for Reconsideration, (Appendix, p. 15a) makes it clear that the Administrative Law Judge relied in part upon the testimony of Scearce's medical witnesses who were not produced for cross-examination.

Fruit of the Loom took an appeal to the Workers' Compensation Board, alleging that there was no proof to support the Administrative Law Judge's decision and contesting the constitutionality of the procedures requiring that the opponent of evidence pay for the privilege of cross-examining the witness. (See Appendix, p. 104a). In a decision rendered October 2, 1992, (Appendix, p. 17a) the Workers' Compensation Board agreed with Fruit of the Loom's position that Scearce had not established the work-relatedness of her alleged injury, reversed the decision of the Administrative Law Judge, and remanded the case for further proceedings. Fruit of the Loom's arguments concerning the constitutionality of Ky. Rev. Stat. Ann. §342.033 (Michie/Bobbs-Merrill 1993 & Supp. 1994) as applied in the case were not addressed, the Workers'

Compensation Board holding that those arguments were moot in light of the reversal of the case on other grounds.

Scearce then filed in the Kentucky Court of Appeals a Petition for Review of the decision of the Workers' Compensation Board, alleging that the Board was in error in holding that there was insufficient proof of work-relatedness or causation in the record before the Administrative Law Judge. Fruit of the Loom cross-petitioned, (Appendix, p. 113a) alleging that the procedures that place the burden of cross-examining Scearce's medical witnesses on Fruit of the Loom are unconstitutional. The Kentucky Court of Appeals, in an unpublished decision, agreed with Scearce that the proof was sufficient to establish causation or work-relatedness and disagreed with Fruit of the Loom's argument concerning the constitutionality of the procedures governing the introduction of medical reports. (Appendix, p. 24a). Interestingly enough, the Kentucky Court of Appeals completely sidestepped the issues relating to the 14th Amendment to the United States Constitution, simply saying that, "We are aware of no statutory or caselaw (sic) within this jurisdiction which compels that the cost of cross-examination be borne by the claimant. If a respondent employer wishes to cross-examine a treating physician it may certainly do so, but it must bear the cost." (Appendix, p. 27a). Of the numerous cases from other jurisdictions cited by Fruit of the Loom which are referred to below, the Kentucky Court of Appeals discussed only one, and then only superficially.

The final step in the process occurred when Fruit of the Loom pursued an appeal to the Kentucky Supreme Court. In a split decision by the Kentucky Supreme Court, (Appendix, p. 1a) Fruit of the Loom's constitutional argument (Appendix, p. 144a) again received short shrift. Like the Kentucky Court of Appeals, the majority of the Kentucky Supreme Court simply said that there is no case or statutory law in this jurisdiction (Kentucky) which requires

that the proponent of medical evidence bear the cost of cross-examination by the adverse party. In fact, there is not one mention, in the majority's opinion, of the United States Constitution or any decision of any Federal court; nor is there any discussion of the state court decisions cited in the briefs. The Chief Justice of the Kentucky Supreme Court, in a dissent joined by an Associate Justice, recognized the constitutional implications of the majority's holding and would have held that the proponent of medical evidence is required to produce the witness for cross-examination pursuant to this Court's decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Fruit of the Loom's Petition for Rehearing to the Kentucky Supreme Court (Appendix, p. 193a) was summarily overruled. (Appendix, p. 30a).

ARGUMENT

U.S. Const. Amend. XIV, which is quoted above, provides, in part, that no State shall deprive a person of property without due process of law. In the present case, the Commonwealth of Kentucky has deprived Fruit of the Loom of its property without due process of law. This Court has long recognized that a taking of property occurs when a State operates a dispute resolution mechanism that takes property from one person and awards it to another. In *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) this Court states:

> The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests. *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The requirement for some kind of a hearing applies to the taking of private property, *Grannis* v. *Ordean*, 234 U.S. 385 (1914), the revocation of licenses, *In re Ruffalo*, 390 U.S. 544 (1968), *the operation of state dispute-settlement mechanisms, when one person seeks to take property from*

> *another*, or to government-created jobs held, absent "cause" for termination, *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Arnett* v. *Kennedy*, 416 U.S. 134, 164 (1974) (POWELL, J., concurring); id., at 171 (WHITE, J., concurring in part and dissenting in part); id., at 206 (MARSHALL, J., dissenting). Cf. *Stanley* v. *Illinois*, 405 U.S. 645, 652-654 (1972); *Bell* v. *Burson*, 402 U.S. 535 (1971).

418 U.S. 539, 557. (Emphasis added).

There can be no doubt that the Kentucky Workers' Compensation system constitutes a dispute resolution mechanism operated by the Commonwealth in which one person seeks to take property from another. Likewise, there can be no doubt that the property which the Commonwealth seeks to transfer from Fruit of the Loom to Scearce is substantial. The Award includes income benefits of $52,678.75, interest on past due amounts, past medical expenses of $5,692.78, all future related medical expenses for the remainder of Scearce's life, and $17,620.64 in temporary total disability benefits.[26] To place the magnitude of the property being taken by the Kentucky Workers' Compensation system in perspective, one need only consider the amount of income benefits that can be awarded for total occupational disability in a Kentucky Workers' Compensation case. If a 21 year old white female worker whose earnings entitle her to maximum benefits is found totally disabled due to an injury occurring during calendar year 1995 and lives out her life expectancy, the income benefits alone (exclusive of medical and rehabilitation benefits) will

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[26] See Prehearing Order and Memorandum dated January 14, 1991.

total $1,258,800.82.[27] The property interest of the parties in the present case, and the property interest of employers at risk in Kentucky Workers' Compensation cases taken as a whole, is enormous.

This Honorable Court has previously recognized the central role whichU.S. Const. Amend. XIV's guarantee of property rights has in the maintenance of the fabric of American society and in the maintenance of the political integrity of American government. Perhaps the most cogent statement of the importance that due process has in our society and system of government is found in *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), where the Court states:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."

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[27] Ky. Rev. Stat. Ann. §342.730(1)(A) (Michie/Bobbs-Merrill 1993 & Supp. 1994) provides maximum income benefits for total disability for the calendar year 1995 in the amount of $415.94 per week. Pursuant to the Life Expectancy Tables contained in Ky. Rev. Stat. Vol. 18A, a 21 year old white female has a life expectancy of 58.2 years. 58.2 years x 52 weeks per year = 3,026.4 weeks. 3,026.4 weeks x $415.94 per week = $1,258,800.82.

> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

401 U.S. 371, 374-75.

This Court long ago recognized the importance of scrupulously observing the requirements of due process in administrative proceedings. In *Morgan* v. *United States,* 304 U.S. 1 (1938) the Court states:

> The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand "a fair and open hearing," — essential alike to the legal validity of the

> administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process.

304 U.S. 1, 14.

The *Morgan* Court goes on to explain that,

> The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.

304 U.S. 1, 22.

Similarly, America's highest Court has long recognized the central role which the opportunity to confront and cross-examine adverse witnesses plays in the "regularized, orderly process of dispute settlement" referred to in *Boddie*. As early as the case of *The Ottowa*, 70 U.S. 268 (1865) this Court recognized the importance of the opportunity to cross-examine adverse witnesses by stating:

> Cross-examination is the right of the party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge, error from truth, opinion from fact, and inference from recollection, and as a means of ascertaining the order of the events as narrated by the witness in his examination in chief, and the time and place when and where they occurred, and the attending circumstances, and of testing the intelligence, memory, impartiality, truthfulness, and integrity of the witness; but a few questions, well directed to those several

> objects, are in general amply sufficient to effect all that can well be accomplished by the fullest enjoyment of that admitted right.

70 U.S. 268, 271.

Indeed, the right to confront witnesses face to face has its roots in ancient sources of law, as recognized by the Court in *Green* v. *McElroy*, 360 U.S. 474 (1959) where the Court reminds us in footnote 25 that:

> When Festus more than two thousand years ago reported to King Agrippa that Felix had given him a prisoner named Paul and that the priests and elders desired to have judgment against Paul, Festus is reported to have stated: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have licence to answer for himself concerning the crime laid against him." Acts 25:16.

The Court's recognition of the fundamental nature of the right to cross-examination has transcended cases and controversies decided by courts of law. Of particular importance to the instant case is the principle that the right to cross-examine adverse witnesses is a necessary, and even a central, element in proceedings before administrative bodies that adjudicate the property rights of the litigants who appear before them. This principle was recognized soon after the beginning of the present century when the Court decided *ICC* v. *Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913). In this case the following language expounding upon the due process rights of the parties to adjudicative administrative proceedings is found:

> In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was

contrary to the "indisputable character of the evidence." (Citations omitted).

* * *

> The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Int. Com. Comm.* v. *Baird*, 194 U.S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, *and must be given opportunity to cross-examine witnesses*, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. *United States* v. *Baltimore & Ohio S.W.R.R.*, 226 U.S. 14.

277 U.S. 88, 91, 93-94. (Emphasis added).

Additional acknowledgment of the fundamental role of cross-examination in administrative proceedings that seek to decide property rights came in *Green* v. *McElroy*, 360 U.S. 474 (1959) where the Court quotes one of the foremost scholars on the law of evidence and discusses the role of cross-examination in administrative adjudications.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and

the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. *We have formalized these protections in the requirements of confrontation and cross-examination.* They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, e. g., *Mattox* v. *United States*, 156 U.S. 237, 242-244; *Kirby* v. *United States*, 174 U.S. 47; *Motes* v. *United States*, 178 U.S. 458, 474; *In re Oliver*, 333 U.S. 257, 273, but also *in all types of cases where administrative and regulatory actions were under scrutiny.* E. g., *Southern R. Co.* v. *Virginia*, 290 U.S. 190; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292; *Morgan* v. *United States*, 304 U.S. 1, 19; *Carter* v. *Kubler*, 320 U.S. 243; *Reilly* v. *Pinkus*, 338 U.S. 269. Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation. *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 168-169 (concurring opinion). Professor Wigmore, commenting on the importance of cross-examination, states in his treatise, 5 Wigmore on Evidence (3d ed. 1940) § 1367:

> "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is

> comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."

360 U.S. 474, 497. (Emphasis added).

The case which Fruit of the Loom relied upon below, and which two of the members of the Kentucky Supreme Court cited in support of their opinion that Fruit of the Loom's constitutional rights were violated, is *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). *Goldberg* involves the question, *inter alia*, whether the prohibition against taking property without due process of law requires that the right of cross-examination be afforded a recipient of welfare benefits before those benefits are terminated. This Court emphatically answers that question in the affirmative. Concerning the right to cross-examine, the Court states:

> "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend *by confronting any adverse witnesses* and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.

397 U.S. 254, 267. (Emphasis added).

The Court goes on to hold that the omission of the right to cross-examine adverse witnesses is "fatal to the constitu-

tional adequacy of the procedures," 397 U.S. 254, 268, and in describing judicial precedent, the Court declares that, "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." 397 U.S. 254, 269.

At least one United States Court of Appeals has held in the Workers' Compensation context that the introduction of medical reports without the right to cross-examine the author thereof is a deprivation of property without due process of law. *Southern Stevedoring Co.* v. *Voris*, 190 F.2d 275 (5th Cir. 1951) is a case arising under the Longshoremen's and Harbor Workers' Compensation Act. In response to a claim that the employer was deprived of due process of law by virtue of a procedure which allowed the introduction of medical reports but denied the employer's right to cross-examine the authors thereof the court states:

> We are aware that sec. 23(a) of the Act, 33 U.S.C.A. 923(a), provides that in conducting a hearing the deputy commissioner 'shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. * * * ' This relaxation of the ordinary rules of procedure and evidence does not invalidate the proceedings, provided the substantial rights of the parties are preserved. *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 127, headnote 14. But this general provision does not, indeed it could not, dispense with *a right so fundamental in Anglo-Saxon law as the right of cross-examination.* Although administrative agencies may be relieved from observance of strict common law rules of evidence, their hearings must

> still be conducted consistently with fundamental principles which inhere in due process of law. *Reilly* v. *Pinkus*, 338 U.S. 269, 70 S.Ct. 110, 94 L.Ed. 63; *McCarthy Stevedoring Corp.* v. *Norton, D.C.*, 40 F.Supp. 957; *L. B. Wilson, Inc.*, v. *Federal Communications Comm.*, 83 U.S.App.D.C. 176, 170 F.2d 793; *Kwasizur* v. *Cardillo*, 3 Cir., 175 F.2d 235. See also *Crowell* v. *Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598.
>
> By admitting these ex parte statements, upon which the deputy commissioner apparently based his decision, at least in part, the right of cross-examination was effectively denied appellants upon a crucial issue. Even under the liberal provisions of the Longshoremen's Act, we can not sanction this practice.

190 F.2d 275, 277. (Emphasis added).

We submit that an examination of the cases decided by this Honorable Court will show that in every instance in which the right of cross-examination has been addressed in the context of an administrative proceeding where a substantial property interest is at stake, this Court has required that at some time before the final decision is made, the right to confront and cross-examine adverse witnesses must be provided. Indeed, in view of the importance which has been ascribed by this Court to the venerable right to confront and cross-examine adverse witnesses, it would be surprising if it were held otherwise.

Of course the highest court of the Commonwealth of Kentucky has held that the right of cross-examination is not eliminated under the statutes and regulations as interpreted and applied below, because the opponent of a medical report may always cross-examine those doctors who offer adverse expert opinion, so long as the opponent is possessed of the means to pay for the right to cross-examine

by paying the witness' fees[28] and the expenses attendant to the taking of a deposition, such as court reporter's fees. In the eyes of the Kentucky Supreme Court, it is perfectly acceptable to require a party[29] to pay for the exercise of the fundamental right of cross-examination when a medical witness is concerned.[30] This view is contrary to the

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[28] Until recently, the fees which physicians could charge for their depositions was unregulated. Charges for the first 30 minutes of testimony by a medical witness could be as high as $900.00 and charges by Board Certified specialists typically were in the $400.00 to $500.00 range. The Commissioner of the Department of Workers' Claims recently promulgated regulations which allow medical providers to charge up to $250.00 for the first half-hour and up to $100.00 for each quarter-hour thereafter for time spent in consulting with counsel and testifying. 803 Ky. Admin. Regs. 25:160 § 3.

[29] It should be noted that, although in this particular case the party wishing to cross-examine a medical witness is the employer, the regulations apply equally as well to employees. The adverse monetary impact of placing a price tag on the right of cross- examination will no doubt be greater with respect to impecunious out-of-work employees than with respect to large corporate employers.

[30] It is interesting to note that the right to cross-examination carries a price of admission only in the case of *medical* expert witnesses. Ky. Rev. Stat. Ann. §342.033 (Michie/Bobbs-Merrill 1993 & Supp. 1994) applies only to the reports of "physicians," a term which is defined by Ky. Rev. Stat. Ann. §342.0011(32) (Michie/Bobbs-Merrill 1993 & Supp. 1994) to include only "physicians and surgeons, psychologists, optometrists, dentists, podiatrists, and osteopathic and chiropractic practitioners acting within the scope of their license issued by the Commonwealth." The testimony of other medical health care providers such as nurses, rehabilitation specialists, etc., as well as other expert witnesses, such as vocational witnesses, industrial hygienists, etc., may only be introduced by deposition or at a hearing (at which time the right of cross-examination is available without a

(Continued next page)

views of this Court and to the views of at least one United States Court of Appeals, as well as every state appellate court which has examined the issue.[31]

Williams v. *Zuckert* 371 U.S. 531 (1963) was a case involving the discharge of a civilian employee of the United States Air Force. The principle issue in the case was whether the employee, Williams, was entitled to cross-examine the witnesses against him in connection with his discharge hearing. Although holding that Williams was not entitled to cross-examine witnesses against him because he did not timely assert the right, the Court makes it clear that had Williams timely requested the right to cross-examine the witnesses against him, *he was entitled to do so and to do so at the expense of the proponent of the evidence.* In so holding, the Court construed regulatory language that is strikingly similar to the language of Ky. Rev. Stat. Ann. §342.033 (Michie/Bobbs-Merrill 1993 &

(Continued from preceding page)

separate charge), since 803 Ky. Admin. Regs. 25:010 § 18(1) provides that, "The rules of evidence prescribed by the Supreme Court apply in all proceedings before the administrative law judges, except as varied by specific statute and this administrative regulation." Since under Kentucky law, proof of medical causation generally requires the consideration of the testimony of a physician, *Salyers v. G & P Coal Co.*, 467 S.W.2d 115 (Ky. 1971), and since medical causation is often one of the most contested issues, as was the situation in the instant case, the impact of the procedures adopted in Kentucky are tremendously important to litigants.

[31] We note that one of the standards for determining whether a Petition such as the instant one will be granted exists when ". . . a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court or a United States court of appeals." Supreme Court Rule 10.1(b). This criterion is certainly met in this case.

Supp. 1994), the statute involved in the present case. In *Williams* the applicable provision stated:

> Opportunity will be afforded for the introduction of evidence (including testimony and statements by the employee and his designated representative and witnesses and by representatives of the agency and its witnesses) and for the cross-examination of witnesses.

371 U.S. 533, at footnote 4.

This Court held that had Williams timely asserted his right to confront and cross-examine the witnesses against him, the Government would have been obligated to produce them, stating:

> Had petitioner discharged this burden by timely attempt to obtain the attendance of the desired witnesses and through no fault of his own failed, then, to give meaning to the language contained in the regulations affording the "opportunity . . . for the cross-examination of witnesses," n4 the Air Force would have been required, upon proper and timely request, to produce them, since they were readily available and under the Air Force's control.

371 U.S. 531, 532-33.

The United States Court of Appeals for the Fifth Circuit would also take a view that differs from that of the Kentucky Supreme Court. In *Cuellar* v. *Texas Empl. Commn.* 825 F.2d 930 (5th Cir. 1987) a claimant to unemployment benefits, Cuellar, was denied benefits based upon an affidavit of a fact witness. Cuellar requested and was denied the right to subpoena and cross-examine the witness against him. After exhausting his administrative remedies, Cuellar filed a complaint under 28 U.S.C.S. § 1983, alleging that this denial of the right to cross-examine witnesses deprived him of due process of law. In reversing the District Court's dismissal of the complaint, the Court of Appeals states:

> A claimant may choose to waive an opportunity to cross-examine, and is not required to confront the witnesses against him. But neither is the claimant required to make the case against himself, *nor to call all witnesses who may be adverse so as to be able to confront them.*

825 F.2d 930, 938. (Emphasis added).

Besides the fact that this Court and at least one Court of Appeals have viewed the right of cross-examination more seriously than the Kentucky Supreme Court, the appellate courts of several States have held, specifically in the Workers' Compensation arena, that the right to confront and cross-examine adverse witnesses may not be conditioned upon the payment of witness fees and court reporter's fees. This line of cases begins with *Chambers* v. *Bigelow-Liptak Corp.*, 344 S.W.2d 588 (Ark. 1961) in which the court says:

> When the Buchman letter was offered before the Referee, the claimant could have agreed to its introduction and reserved the right to cross-examine. If such reservation had been made, then when the claimant wanted to cross-examine Dr. Buchman, *the employer would have been obliged to produce him*; but no such reservation was made.

344 S.W.2d 588, 590. (Emphasis added).

Four years later the Arizona appellate courts issued a similar decision in *Jones* v. *Industrial Commn.*, 401 P.2d 172 (Ariz. App. 1965). In discussing the right of a party to a Workers' Compensation proceeding to cross-examine adverse witnesses without paying the witness's fees the court states:

> We are aware that the Commission has in its file, many independent reports of facts upon which it may base its investigation of a particular claim, and we do not wish to restrict the Commission's right to make independent investigations and examinations of the

> facts concerning the claims for compensation, but where the Commission uses evidence, testimony, reports, documents, affidavits or any matter which may appear in the file upon which to base an award, there must be full and complete opportunity on the part of the parties to cross-examine the person or persons giving such evidence, testimony, reports, documents, affidavits or matters.

401 P.2d 172, 175.

* * *

> Attorney for respondent Industrial Commission urges that the petitioner has the "opportunity" to cross-examine if he has the right to call witnesses for the purpose of cross-examination. We do not agree with this position. Under the Arizona cases cited above, and Rule 30, the party entitled to cross-examination must be presented with an "opportunity" or occasion wherein he may cross-examine persons whose testimony, ex parte affidavits, reports or statements the Commission intends to use or may use as evidence upon which to base its award. *The party entitled to the right or "opportunity" for cross-examination should not be compelled to expend money or effort in obtaining that "opportunity". McCarthy Stevedoring Corporation* v. *Norton*, 40 F.Supp. 957 (1939).

401 P.2d 172, 176. (Emphasis added).

Chavez v. *Industrial Commn.*, 425 P.2d 864 (Ariz. App. 1967) reaffirms the holding of *Jones*, the court stating:

> The actual report of the Safety Department does not appear in the file, and there is no direct evidence concerning its preparation, either how it was prepared, or by whom. It is apparent from the record that Dr. Findlay relied upon this report in reaching his medical conclusion that the accident did not cause petitioner's hearing loss. It is apparent from the record that Dr. Blair Saylor relied upon Dr. Findlay's letter

and its reference to the Safety Department report in reaching his medical conclusion.

* * *

Petitioner is entitled to a formal hearing to cross-examine those who prepared the report since that report was the basis of testimony and reports which the Commission did use as the basis for its award, and therefore figured in the Commission's determination indirectly.

We have also previously stated that the petitioner is not required to find and bring to the hearing the witness for cross-examination; it is up to the Commission to do so if it intends to use such evidence upon which to base its decision. *Avenente* v. *Smouse*, 1 Ariz.App. 24, 398 P.2d 932 (1965).

425 P.2d 864, 866. (Emphasis added).

The appellate courts of Louisiana have also published a decision suggesting a view contrary to that of Kentucky. Specifically, in *Doss* v. *American Ventures*, 224 So.2d 470 (La.App. 1969) the court remarks:

> Next, from the language of § 1122 we emphasized above, it is incumbent on a party disputing any statement therein to notify the other within six days. The statute does not refer at that point to "facts," and we cannot substitute for its language the view that only where "facts" are disputed is notification necessary. Dispute as to opinion or conclusion must also be notified. Failure to notify deprives one of no substantive right, not even the right to call the reporting doctor as a witness for cross-examination. It merely authorizes receipt into evidence of the report, thus eliminating *the obligation to produce the reporting physician in person as a witness and to tender him for cross-examination.*

224 So.2d 470, 477-78. (Emphasis added).

Moving forward to the year 1976, we find that the highest court of Alaska examined the very issue here under discussion. Adding to the weight of authority, the court held that the proponent of a medical report must bear the cost of producing the author for cross-examination in order to avoid running afoul of due process requirements. In the words of the court in *Commercial Union Cos.* v. *Smallwood*, 550 P.2d 1261 (Alaska 1976):

> Additionally we note that the better reasoned, and weight of, authority is to the effect that *the right of cross-examination does not carry a price tag.* We have not been referred to any court decision holding that a party waived his right of cross-examination when to exercise that right would have required that party to bear the initial cost of producing the witness at the hearing. Yet, if appellants in the case at bar desired to exercise their right to cross-examine the physician-authors of the medical reports introduced by Smallwood, they would have had the burden of bearing the cost of subpoenaing them. In light of the decisional law which enunciates the rule that the constitutional right of cross-examination is not dependent upon a monetary prerequisite, we further conclude that appellants did not waive their right of cross-examination in the case at bar by virtue of their failure to subpoena the authors of the medical reports.

550 P.2d 1261, 1266-67. (Emphasis added).

1980 saw Oregon adopt the same rule of law when the court in *Hanna* v. *Mcgrew Bros. Sawmill*, 605 P.2d 724 (Ore. App. 1980), *mod.* 609 P.2d 422 (Ore. App. 1980) stated:

> The testimony of Dr. Weinman was presented on behalf of EBI. He was EBI's witness. The statute, ORS 656.310(2), allows the medical testimony to be presented by way of medical reports. Admission of the medical reports is specifically conditioned on the right of the opposing party to cross-examine the doctor. *The procedure of offering medical testimony through the*

> *medium of written reports does not alter the status of the witness when he is called for the purposes of cross-examination. He still remains the witness of the party offering the medical reports and that party is responsible for paying the fees and expenses incident to his appearance as a witness for cross-examination.*

605 P.2d 724, 728. (Emphasis added).

Finally, as recently as 1986 the courts of New Jersey have recognized that the right of cross-examination cannot be burdened with a price tag. *Paco* v. *American Leather Mfg. Co.*, 516 A.2d 623 (N.J. Super. 1986) provides:

> Hence, a party's fundamental right to due process which includes the right to present and cross-examine a witness, must be respected.

516 A.2d 623, 625.

* * *

> The high cost of producing medical testimony, although a heavy burden for the injured employee to bear in some instances, simply cannot justify the trammeling of fundamental rights in a contested formal proceeding. It is firmly established in our jurisprudence that parties must be afforded the right to cross-examine witnesses and to produce evidence to address the relevant issues in a contested proceeding.

516 A.2d at 627.

Even the Kentucky Supreme Court would seemingly recognize that, at least in the context of a criminal case, due process will not allow the introduction of a medical report unless the author is produced for cross-examination. In *Bell vs. Commonwealth of Kentucky*, 875 S.W.2d 882 (Ky. 1994) the Kentucky Supreme Court holds constitutionally infirm the admission of a medical report in a criminal trial when the author is not produced by the proponent of the evidence for cross-examination, even though the witness could have simply been subpoenaed by the defendant. The court says,

> Explicit in the trial judge's reply, "But all you have to do is subpoena him [sic]," is the suggestion that if defense counsel wanted to cross-examine Dr. Martz, then defense counsel could have subpoenaed her as a witness. While theoretically a true statement, the judge's recommendation, if adopted, would improperly shift the burden of going forward with enough evidence to support a prima facie case for admissibility, to the non-offering party.

875 S.W.2d 882, 886

* * *

> The error in admitting this medical report into evidence is one of constitutional magnitude which highlights the law's cardinal concern with hearsay evidence. The Sixth Amendment of the United States Constitution and Section Eleven of the Kentucky Constitution provide the accused with the right to personal confrontation with prosecution witnesses in a criminal trial. "Fundamental guarantees to the criminally accused of due process and confrontation, established by both the United States and Kentucky Constitutions are transgressed by a . . . conviction based upon hearsay where no traditionally acceptable and applicable reasons for exceptions apply." Id. at 382.

875 S.W.2d 882, 888

* * *

> It is historically well-established that the Confrontation Clause has two purposes:
>
> > The primary purpose is to secure for the accused the full and unfettered right of cross-examination of the witnesses against him. The secondary purpose is to allow through the "personal appearance" of the accuser, the judge and the jury to closely observe, first hand, the "elusive and uncommunicable evidence of a witness' deportment while testifying."

> *Commonwealth* v. *Willis*, Ky., 716 S.W.2d 224, 234 (1986) (Stephens, C.J., dissenting) (quoting 5 Wigmore, Evidence Sec. 1395 (3d ed., Chadbourn revision, 1974)). While not precisely congruous, the Confrontation Clause and hearsay rules "stem from the same roots" and "are generally designed to protect similar values." Lawson, supra, Sec. 8.00, pp. 354-5 (quoting *California* v. *Green*, 399 U.S. 149, 155-56, 90 S.Ct. 1930, 1933-4, 26 L.Ed.2d 489, 495-96 (1970)). A violation of the rule against hearsay is not, per se, a violation of a defendant's confrontation rights. Under the present facts, however, there is no doubt that appellant was unjustifiably denied his constitutional right to confront and cross-examine the author of this damning piece of evidence.

875 S.W.2d 882, 888.

We submit that the parties to a Workers' Compensation case in which over One Million Dollars could be at stake are entitled to the same due process right of cross-examination as is a defendant in a criminal case or the parties in an ordinary civil action. We have no doubt that neither the Kentucky Supreme Court nor this Honorable Court would countenance the introduction by the prosecution of medical reports from a doctor who lives on the other side of the continent, while telling the defendant that he is guaranteed the right of cross-examination, but that he will be required to travel to the witness's place of residence and pay the fee demanded by the witness in order to exercise that right. Nor would the Kentucky Supreme Court or this Honorable Court tell an impecunious plaintiff in a products liability action, or the Forbes 500 defendant in that action, that the report of an expert may be introduced as evidence and if the opponent wishes to cross-examine the witness it will be required to arrange for the appearance of the witness at trial.

The litigants in a Kentucky Workers' Compensation case are entitled to the same constitutional due process as the criminal defendant and the civil litigant, especially since, as we have seen above, Kentucky has elected to allocate Workers' Compensation benefits based upon an adversarial trial-type adjudicatory process.

CONCLUSION

As this Court recognized in *Boddie* v. *Connecticut, supra,* the right of cross-examination is central to the maintenance of our legal and political system. In this Petition we have referred to numerous decisions of this Court which, we submit, establish that the right of cross-examination is a necessary part of any adjudicatory administrative procedure which seeks to deprive a person of property.

A right which is as essential to fundamental fairness as is the 14th Amendment right to cross-examination cannot be granted or withheld depending upon the ability and willingness of the person seeking to exercise it to, first, bear the burden of pursuing and securing the appearance of an adverse witness in order to test the witness's veracity, bias, accuracy of information relied upon, etc., and, second, pay several hundred dollars as a prerequisite to exercising the right. The highest court of every State which has examined the question, with the sole exception of Kentucky, has refused to place a price tag on the exercise of this fundamental right. In Kentucky, thousands of litigants[32] are being denied the fundamental right to cross-examine witnesses of a particular class (physicians)

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[32] See the paper presented by Hon. Walter W. Turner, Commissioner of the Kentucky Department of Workers' Claims on June 26, 1995 which indicates at Appendix 1a. that in calendar year 1994 approximately 11,000 claims were filed. (Appendix, p. 219a).

unless they are willing to pay a price for the exercise of that right. This Honorable Court should grant this Petition in order to ensure that those fundamental rights which are embodied in our Constitution remain available to all.

Respectfully submitted,

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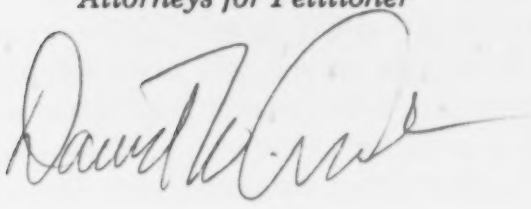

CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition were on this 28 day of July, 1995 placed in the U.S. Mail, postage prepaid, addressed to the following: Hon. Morris Butler, 202 W. Court St., P.O. Box 280, Greensburg, KY 42743 and Hon. William A. Miller, Sr., 17th Floor Kentucky Home Life Bldg., 239 S. 5th Street, Louisville, KY 40202-3269, Attorneys for Mary Kay Scearce; Hon. Thomas A. Dockter, 624 W. Main St., 4th Floor, Louisville, KY 40201-3167; Hon. Chris Gorman, P.O. Box 2000, Frankfort, KY 40602-2000, Attorney General of the Commonwealth of Kentucky; and Hon. Walter W. Turner, Commissioner, Department of Workers' Claims, Perimeter Park West, 1270 Louisville Road, Building C, Frankfort, KY 40601.

APPENDIX

RENDERED: FEBRUARY 16, 1995
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

93-SC-000865-WC

UNION UNDERWEAR COMPANY, INC.
d/b/a FRUIT OF THE LOOM - - - - - *Plaintiffs*

v.

MARY KAY SCEARCE, WORKERS' COMPENSATION
BOARD - - - - - - - - - - - - *Appellee*

APPEAL FROM COURT OF APPEALS
NO. 92-CA-002648
(WORKERS' COMPENSATION BOARD NO. 89-000667)

OPINION OF THE COURT BY SPECIAL JUSTICE ROBERT E. GILLUM—AFFIRMING

Mary Kay Scearce (Scearce) quit school after the eighth grade and began working for the appellant at age sixteen (16). For twenty-one (21) years Scearce was a sewing machine operator, working eight to nine hours per day, six days a week, averaging Two Hundred (200%) percent of her production quota. The type of work Scearce performed required repetitive motion of her hands and arms.

In February, 1986, Scearce began experiencing pain in her right arm, shoulder and neck. Later she developed pain in her right wrist. The pain increased over time and Scearce was placed on temporary, total disability. She shortly returned to work as an examiner. However, as a result of continued pain Scarce was again placed on temporary, total disability. Thereafter, she filed this claim. Scearce testified that after she ceased working, her condition worsened, she was in constant pain, she could not

raise her arm, could not sleep and she experienced numbness and tingling in her right side.

The Administrative Law Judge (ALJ) entered an opinion and Award in favor of Scearce, finding that she had sustained a fifty percent (50%) permanent, partial, occupational disability. Appellant's Petition for Reconsideration was denied.

On appeal to the Workers, Compensation Board (the Board) the appellant asserted two arguments. First, appellant contends that there was insufficient evidence that Scearce's condition was work-related. Second, appellant argues that the use of the Form 107, as provided by KRS 342.033 and 803 KAR 25:011 _13, was constitutionally defective. The Board reversed the ALJ, basing its findings 'on appellant's first argument that there was no substantial evidence that Scearce's condition was caused by work.

The Court of Appeals reversed the Board, reinstating claimant's award of benefits.

The first issue before this Court is one of first impression.

I. IN A HEARING BEFORE AN ADMINISTRATIVE BODY IS IT A VIOLATION OF CONSTITUTIONAL DUE PROCESS TO REQUIRE THE PARTY DESIRING CROSS-EXAMINATION TO ASSUME THE COST OF CROSS-EXAMINATION?

In this action the claimant, Scearce, introduced three (3) medical reports pursuant to KRS 342.033 and the Kentucky Workers' Compensation Board Rules of Procedure, 803 KAR 25:011, §13. The appellant filed one (1) medical report under these 2 provisions, and chose to take its remaining medical proof by deposition. Appellant filed objections to the introduction of claimant's medical reports and demanded that the physicians be produced for the purpose of cross-examination. The Administrative Law Judge (ALJ) overruled the objections of appellant.

The primary purpose of the workers, compensation statute is the elimination of common-law actions for personal

injuries growing out of industrial operations. *Releford* v. *Eastern Coal Corp.*, 260 F.2d 447, cert. denied, 79 S.Ct. 797, 359 U.S. 958, 3 L.Ed.2d 765.

The purpose of the amended workers, compensation statute is to provide for the swift and inexpensive resolution of compensation claims. *See generally*, William Haynes, *Kentucky Jurisprudence* —Workers' Compensation, §1.4 (1986).

Appellant, in this case, was never denied the opportunity to cross-examine the claimant's physicians. 803 KAR 25:011 §13(10) expressly provides for cross-examination when it states:

> If a written medical report is admitted as direct testimony, any adverse party may depose the physician making the written report as cross-examination concerning it, and the deposition shall be filed as proof without a motion.

This rule applied equally to the claimant and the appellant in this case. The appellant chose not to incur the cost of cross-examination of claimant's physicians.

Administrative due process does require that cross-examination be guaranteed. *Kaelin* v. *City of Louisville*, Ky. , 643 S.W.2d 590 (1982). However, administrative due process does not require that the cost of cross-examination be borne by the proponent of the direct examination. There is no case law or statutory law within this jurisdiction which asserts that the cost of cross-examination must be borne by the proponent of the direct examination. under the provisions of KRS 342.033, either party is permitted to introduce direct testimony from a physician through a written medical report subject to cross-examination by the adverse party. If the claimant is required to produce, at claimant's expense, the physician for cross-examination, the introduction of medical reports as direct testimony under the provisions of KRS 342.033 would be eliminated. In each case the employer would demand the production of the physician at a deposition for cross-examination, and the claimant would not compound the cost by having the physician

prepare the written report and also appear for deposition. This would defeat the purpose of the amended workers, compensation statute of providing for the swift and inexpensive resolution of compensation claims.

II. WERE THE FINDINGS OF THE ALJ THAT THE INJURIES SUSTAINED BY SCEARCE WERE WORK RELATED SUPPORTED BY SUBSTANTIAL EVIDENCE?

The facts as to claimant's work history, as set out above, were part of the ALJ's findings of fact. In addition, the ALJ found that the existence of claimant's permanent functional impairment was supported by the report of three (3) physicians. The ALJ went on to find, "The diagnosis made by Dr. Kasdan of Accumulative Fatigue Disorder, which he indicated was a synonym for Overuse Syndrome or Repetitive Strain Disorder, lends further credence to the findings . . ."

The Workers' Compensation Board's opinion found that the uncontradicted opinion evidence that the claimant's condition was not work related could not be summarily cast aside by the trier of fact. Citing *Mengel* v. *Hawaiian Tropic Northwest and Central Distribution, Inc.*, Ky.App., 618 S.W.2d 184 (1981). The Court of Appeals went on to say in this case, that there are some situations in which a board (ALJ) will be upheld on review when the board (ALJ) had made findings contradicting the medical testimony *(Id.*, at 186).

When the Workers' Compensation Board reviews the findings of the ALJ, its review is restricted to a determination of whether the factual findings of the trier of fact was "clearly erroneous" *Hudson* v. *Owens*, Ky., 439 S.W.2d 565, 568 (1969). In addition, the Court of Appeals stated, "The medical evidence, although relevant and material, must be considered not as determinative but rather as a part of the totality of the circumstances upon which the board (ALJ) must make the factual determination. . . ." *(Id.*, at 569).

After reviewing the record, we find the findings of the ALJ were supported by substantial evidence; that is, evidence of substance and relevant consequence having the

fitness to induce conviction in the minds of reasonable men. *Smyzer* v. *B. F. Goodrich Chemical Company*, Ky., 474 S.W.2d 367, 369 (1971).

For the foregoing reasons the opinion of the Court of Appeals is affirmed.

Leibson, Reynolds, Spain and Wintersheimer, JJ., concur. Stephens, C.J., files a separate dissenting opinion in which Stumbo, J., joins. Lambert, J., not sitting.

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RENDERED: FEBRUARY 16, 1995
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

93-SC-000865-WC

UNION UNDERWEAR COMPANY, INC.
d/b/a FRUIT OF THE LOOM - - - - - - *Appellant*

v.

MARY KAY SCEARCE, WORKERS' COMPENSATION
BOARD - - - - - - - - - - - - - *Appellee*

APPEAL FROM COURT OF APPEALS
NO. 92-CA-002648
(WORKERS' COMPENSATION BOARD NO. 89-000667)

DISSENTING OPINION BY CHIEF JUSTICE STEPHENS

Respectfully I dissent.

While I agree with the majority that there was sufficient evidence to prove that Scearce's condition was work-related and would affirm on those grounds, 1 cannot agree that Fruit of the Loom was not denied Constitutional due process in these administrative proceedings.

The United States, Constitution necessitates that parties be guaranteed the right to cross-examine adverse witnesses in administrative proceedings. See Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970); Kaelin v. City of Louisville, 643 S.W.2d 590 (1983). The cost of cross-examination must be assumed by the party introducing the medical reports pursuant to KRS 342.033 to ensure the due process guarantees of the Constitution are met.

Although the administrative regulation provides for the possibility of cross-examination, it does not ensure that

this fundamental right will be guaranteed. Because Fruit of the Loom is guaranteed these rights under the Constitution, they should not be compelled to bear the expense of taking that opportunity as a result of the actions of an adverse party.

As a result of the foregoing, I dissent.

STUMBO, J., joins in this dissenting opinion.

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS
Claim No. 89-00667

MARY KAY SCEARCE - - - - - - - - *Plaintiff*

v.

FRUIT OF THE LOOM and
SPECIAL FUND - - - - - - - - - *Defendants*

OPINION, AWARD AND ORDER

ORIGINAL TO DEPARTMENT OF WORKERS' CLAIMS

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FINDINGS OF FACT

1. The parties agreed to the following stipulations at the Pre-Hearing Conference: coverage; employment relationship; alleged work-related injury on February 22, 1988; due and timely notice of alleged injury; temporary total disability benefits paid at the rate of $281.60 per week from November 29, 1988 through June 12, 1990 for a total of $17,620.64; medical expenses paid in the amount $5,692.78; Plaintiff returned to work for various periods to be discussed at Hearing; date of birth January 8, 1950; eighth grade education; and no specialized or vocational training.

The remaining contested issues after the Pre-Hearing Conference were: average weekly wage; extent and duration of disability; and causation.

Upon oral motion, the Special Fund was dismissed as a Party-Defendant.

At the Hearing, Plaintiff's average weekly wage was stipulated to be $406.86. Specific periods of temporary total disability benefits were also stipulated to be from November 29, 1988 through April 21, 1989 and from September 5, 1989 through June 12, 1990.

2. The Plaintiff, Mary K. Scearce, is presently 42 years of age. She testified that she quit school after the eighth grade at the age of , 13 and started working for the Defendant-Employer at the age of 16. Plaintiff worked as a sewing machine operator binding legs on briefs. She testified that this required pulling with both hands and using both feet on pedals. Plaintiff also stated that she averaged 200% of the required production level and worked eight to nine hours per day six days per week. After her return to work with restrictions, Plaintiff indicated that she was placed on a job as an examiner. This did not require the same physical capabilities that were necessary as a sewing machine operator.

Plaintiff testified that she stopped working on February 22, 1988 as a result of sharp pain which ran up her right Arm into her shoulder and neck. She also developed pain in her left wrist, as well. The medical treatment provided by her physicians is described hereafter in the summary of medical evidence.

At the time of the Hearing, Plaintiff indicated that she was in constant pain, could not raise her arm and could not sleep, as her whole side feels numb and tingles., She stated that the condition was affecting her more every day and she was unable to do housework, fix her hair and wear clothes that were not closed in the front. It was her opinion that she was totally incapacitated from working since June 12, 1990. Plaintiff had filed a claim for Social Secu-

rity Disability Benefits which was still pending at that time.

3. The medical evidence considered in this claim is summarized as follows:

(a) Dr. Phil Aaron, a general practitioner, first examined the Plaintiff on February 22, 1988. Plaintiff indicated to him that she had had problems for two years previously, but did not miss any work. It was Dr. Aaron's diagnosis that Plaintiff had suffered an injury to her right shoulder, arm and both wrists and muscles.

Dr. Aaron rated Plaintiff as having a 27% AMA Guidelines impairment rating and reported that the problems which Plaintiff had with her fingers and wrists tingling would not be included in the rating. Dr. Aaron restricted the Plaintiff to no lifting due to the shooting pain it caused in her right arm and a prohibition against operating machinery.

(b) Dr. Narashimha Reddy, an orthopedic surgeon, first examined Plaintiff on March 4, 1988. Dr. Reddy relied upon an EMG which revealed subtle evidence of C-8, T-1 radiculopathy apart from bilateral carpal tunnel syndrome. He also noted that Plaintiff had had a normal MRI. Dr. Reddy performed arthroscopic surgery upon Plaintiff's right knee, which was unrelated to any work-related injury.

Dr. Reddy rated Plaintiff as suffering a 10% permanent functional impairment rating based upon the AMA Guidelines and the tables referencing the cervical region of her spine. Said doctor further indicated that the physical condition would cause. greater occupational implications. He restricted her to lifting 10 pounds maximum and 0 pounds frequently.

(c) Dr. Kenneth DeSimone, a general surgeon, examined Plaintiff on August 24, 1990. Dr. DeSimone diagnosed the Plaintiff as suffering from thoracic outlet compression based upon a positive Adson's Test, which indicated a reduction of Plaintiff's pulse. It was said doctor's opinion that the diagnosis of carpal tunnel syndrome could not be

made, but he did note tenderness on the lateral epicondyle of the musculature.

Dr. DeSimone rated Plaintiff as suffering a 38% functional impairment based upon the AMA Guidelines and McBride's Guide to Disability Evaluation. He further indicated that Plaintiff should be restricted to lifting 10 pounds maximum because of her right arm pain.

(d) Dr. Dennis O'Keefe, a neurologist, examined Plaintiff on October 29, 1990. Dr. O'Keefe interpreted Plaintiff's nerve conduction studies as being normal. He found no evidence of carpal tunnel syndrome and did not feel that the Plaintiff's complaints were a result of a work-related injury, as he found no abnormalities. Dr. O'Keefe stated that he did not perform the Adson's Test for the diagnosis of thoracic outlet syndrome, as he felt that it was an unreliable "terrible" test.

(e) Dr. Morton Kasdan, a hand surgery specialist, examined Plaintiff on March 16, 1989 upon referral by Dr. Miles. Dr. Kasdan indicated that all of tests he performed upon the Plaintiff were negative or normal except for the Phalen's Test, which indicated numbness and tingling and compression at Plaintiff's wrists. The neurological studies performed by Dr. Corwin, at Dr. Kasdan's request, were interpreted as being normal, but Dr. Corwin suspected that Plaintiff had a combination of tendonitis and musculoskeletal pain. Dr. Kasdan determined that Plaintiff did not have an AMA Guideline functional impairment. However, he recommended that Plaintiff enter a rehabilitation counseling program. He expected that Plaintiff would have problems with return to rapid repetitive work with her upper extremities.

(f) Dr. Stanley Collis, an orthopedic surgeon, examined Plaintiff on June 12, 1990. Dr. Collis found Plaintiff's examination to be entirely normal and found no work-related problem. He rated Plaintiff as having a 0% disability, but reported that she might have ache and discomfort. It was his suggestion that work and normal activities would be best for her.

4. Vocational testimony was offered by William Summitt, who evaluated the Plaintiff on December 3, 1990. In determining Plaintiff's loss of access to the labor market, Dr. Summitt relied upon the information given to him by the Plaintiff and the medical reports provided to him by the Defendant-Employer. Based upon the reports of Dr. Kasdan, and Dr. Aaron, Dr. Summitt indicated that Plaintiff should not be performing sewing machine work. He rated her as suffering an occupational loss of 11.23%. Dr. Summitt stated that if Plaintiff could return to work, she would have even less of an impairment with no loss. However, if he utilized only Dr. Reddy, Dr. Aaron's and Dr. DeSimone's report, Dr. Summitt stated that Plaintiff would have a 25% occupational loss. Dr. Summitt stated that if he used the reports of Dr. Collis, Dr. O'Keefe and Dr. Kasdan, Plaintiff would suffer no occupational loss. Finally, Dr. Summitt indicated that Plaintiff told him that she would be willing to go to work any time for $5.00 if she could do the job.

5. Based upon the Plaintiff's testimony at her discovery deposition and Hearing, the medical and vocational testimony and utilizing the principles announced in the case of *Osborne* v. *Johnson*, Ky., 432 S.W.2d 800 (1968), this Administrative Law Judge determines that the Plaintiff has suffered an occupational disability of 50%.

In making this determination, the testimony of Dr. Aaron, Dr. Reddy and Dr. DeSimone was found to be most persuasive on the issue of the existence of Plaintiff's permanent functional impairment. The diagnosis made by Dr. Kasdan of Accumulative Fatigue Disorder, which he indicated was a synonym for Overuse Syndrome or Repetitive Strain Disorder, lends further credence to the findings of the above-mentioned doctors. Dr. Kasdan's recommendation of a rehabilitation counseling program and opinion that Plaintiff would have problems with return to rapid repetitive work with her upper extremities, is, likewise, found to be convincing evidence to this Administrative Law Judge.

As it relates to the issue of causation, the Plaintiff's testimony regarding the physical requirements of her sewing machine operator job convinces this Administrative Law Judge that she has suffered an injury caused by the repetitive motion of her hands, wrists, arms and shoulders. This is the type of repetitive trauma injury referenced by the Court in the case *Haycraft* v. *Cohart Refractories Company*, Ky., 544 S.W.2d 222 (1977). Plaintiff's testimony is unrefuted about her average production level equaling 200%. She also testified that this job was performed eight to nine hours per day six days per week and the Plaintiff's probative testimony on the issue of causation is found to be conclusive due to the supporting testimony of Dr. Aaron, Dr. Reddy, Dr. DeSimone and Dr. Kasdan.

6. The determination of the Plaintiff's occupational disability is based, in part, upon her young age, limited education and over 20 years of work with the Defendant-Employer. However, the testimony of Dr. Summitt, a vocational expert, was also considered. Dr. Summitt listed occupational losses ranging from 0% to 25%, depending upon which doctors were referenced. The 50% occupational disability finding is felt to be a fair reflection of Plaintiff's present occupational loss. In order to assist her in re-entering the labor market, this Administrative Law Judge finds that she is an excellent candidate for vocational rehabilitation services pursuant to KRS 342.710. This is also in conformity with Dr. Kasdan's recommendation.

CONCLUSIONS OF LAW

KRS 342.0011	KRS 342.020	KRS 342.710
KRS 342.730	Cases as cited.	

ORDER AND AWARD

IT IS HEREBY ORDERED AND ADJUDGED by the undersigned Administrative Law Judge as follows:

1. The Plaintiff, Mary K. Scearce, shall recover of the Defendant-Employer, Fruit of the Loom, and/or its insurance carrier, the sum of $123.95 per week for 50% occupa-

tional disability beginning June 13, 1990 and continuing thereafter for a period not to exceed 425 weeks, together with interest at the rate of 12% per annum on all due and unpaid installments of such compensation, and the said Defendant shall take credit for any payment of such compensation heretofore made.

2. The Plaintiff, Mary K. Scearce, shall further recover of the Defendant-Employer, and/or its insurance carrier, for the cure and relief from the effects of the injury such medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances, as may be reasonably required at the time of injury and thereafter during disability, and the said Defendant shall take credit upon this Award for such medical, surgical and hospital expenses heretofore paid.

3. Plaintiff shall submit to an appropriate rehabilitation evaluation under the provisions of KRS 342-710.

4. All motions for approval of attorney's fees shall be filed with this Administrative Law Judge within 30 days after final disposition of this Award.

DATED this 7th day of February, 1992.

/s/ Thomas A. Dockter
Thomas A. Dockter
Administrative Law Judge

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS
Claim No. 89-00667

MARY KAY SCEARCE - - - - - - - - *Plaintiff*

v.

FRUIT OF THE LOOM and
SPECIAL FUND - - - - - - - - - *Defendants*

AMENDED ORDER

ORIGINAL TO DEPARTMENT OF WORKERS' CLAIMS

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It is first Ordered in this case that the Attorney Fee Order issued on March 9, 1992 is VACATED and HELD FOR NAUGHT, as the appeal time has not expired in this case and the Defendant-Employer has timely filed the Petition for Reconsideration ruled upon in this Order. The Plaintiff may renew his Motion for Attorney's Fee upon final disposition of this Award.

As it relates to the Defendant-Employer's Petition for Reconsideration, it is noted that the Plaintiff has filed a response and both have been considered by this Administrative Law Judge. The Defendant-Employer's Petition for Reconsideration is hereby OVERRULED. The Defendant-Employer argues that since the Plaintiff relied upon Form

107s to present her proof, there has been no showing of causation. However, as specifically noted on page 7 of the opinion and Award, this Administrative Law Judge relied upon the testimony of the *Plaintiff* to establish a *Haycraft-type* injury. The case of *Caudill* v. *Maloney's Discount Stores*, Ky., 560 S.W.2d 15 (1977) clearly holds that Plaintiff's testimony is probative evidence in a claim. Plaintiff was found to be very credible and, when her testimony was taken in conjunction with the medical evidence offered by Dr. Aaron, Dr. Reddy, Dr. DeSimone and Dr. Kasdan, this Administrative Law Judge found causation to be established. Dr. Kasdan, who testified by deposition, found a positive Phalen's Test, which indicated numbness and tingling and compression at Plaintiff's wrists. When this positive test result was combined with Dr. Kasdan's expectation that the Plaintiff would have problems with return to rapid repetitive work with her upper extremities, this testimony was found to be supportive of this Administrative Law Judge's decision.

DATED this 25th day of March, 1992.

/s/ Thomas A. Dockter
Thomas A. Dockter
Administrative Law Judge

OPINION RENDERED: OCTOBER 2, 1992

COMMONWEALTH OF KENTUCKY
WORKERS' COMPENSATION BOARD

Claim No. 89-00667

UNION UNDERWEAR COMPANY, INC.
d/b/a FRUIT OF THE LOOM (INCORRECTLY
NAMED FRUIT OF THE LOOM, INC.) - - - *Petitioner*

v.

MARY KAY SCEARCE, and
HON. THOMAS A. DOCKTER, Administrative
Law Judge - - - - - - - - *Respondents*

APPEAL FROM THE HON. THOMAS A. DOCKTER
ADMINISTRATIVE LAW JUDGE

REVERSING

BEFORE: ANGELUCCI, Chairman, GREATHOUSE, And TURNER, Board Members.

TURNER, MEMBER. Union Underwear Company, Inc. d/b/a Fruit of the Loom ("Union") appeals from an Opinion, Award and order rendered by Administrative Law Judge Thomas A. Dockter ("ALJ") on February 7, 1992, wherein it was found that the claimant,, Mary Kay Scearce ("Scearce"), was 50% occupationally disabled due to cumulative 'trauma injury to her upper extremities. On appeal, Union argues that the medical evidence of record is insufficient to support a finding of causal nexus between Scearce's work at Union and her impaired condition. Union also launches a constitutional attack against the implementation of the provisions of KRS 342.033 allowing the introduction of the opinions of physicians in workers' com-

pensation proceedings through medical reports in lieu of deposition.

Scearce, born January 8, 1950, commenced work for Union as a sewing machine operator at the age of 16. Her work entailed repetitive arm and hand movements in the process of binding legs upon briefs. Over the years, Scearce labored at a pace which yielded 200% of her production quota. In approximately February 1986, Scearce experienced pain in her shoulders and neck for which she sought medical treatment. She explained that at that time she was required to tie her own work and throw it in a wagon. She surmised that this activity irritated her neck and shoulders. Claimant alleged that the pain started in the shoulder and neck area and ran down her right arm into the wrist. She labored as much as nine hours per day, six days per week. As told by Scearce, the condition became progressively worse until she was compelled to quit in September of 1989. She testified that the respite of unemployment had no effect on her condition and did not decrease the level of her pain.

Union challenges the award upon the ground that Scearce did not present an opinion from any medical witness categorically stating that she suffered any type of repetitive (or overuse) syndrome caused by her work. The evidentiary void is accountable in part to the fact that Form 107 medical reports were utilized to present the opinions of three of the claimant's physicians. Unfortunately, the form report routinely did not address the matter of the etiology of the worker's condition.

Dr. Phil Aaron evaluated Scearce on July 27, 1990, and through Form 107 reported that the patient had pain and tingling in the fingers with squeezing and handling, and that in Dr. Aaron's judgment, she was precluded from further work as a machine operator. Additional complaints included numbness and pain in her right shoulder. No assessment was made as to the cause of the claimant's condition.

Another Form 107 report was submitted on claimant's behalf from Dr. A. Narasimha Reddy and likewise it did not address the issue of work-relatedness. And finally, a Form 107 report of Dr. Kenneth J. S. DeSimone revealed that Scearce gave a "prolonged history of over use syndrome . . . of the right and left upper extremities," and that she had tingling in the right arm and a positive Adson's test for thoracic outlet compression. Yet, DeSimone's 107 expressed no opinion as t ausation.

Union presented opinion testimony from Drs. Stanley Collis, Morton Kasdan and Dennis O'Keefe. Dr. Collis evaluated at the bequest of the employer and adjudged Scearce's physical examination to be entirely normal. He concluded she had no .disabling condition which necessitated release from work.

Hand surgeon, Dr. Morton Kasdan, evaluated Scearce on February 16, 1989, upon referral from Union's plant physician. By and large, the results of physical examination were normal but for a positive Phalen's test, which, according to Dr. Kasdan, can be indicative of nerve compression in the wrist. A consulting neurologist reported nerve conduction studies to be normal. Dr. Kasdan concluded that the claimant probably suffered cumulative fatigue disorder. However, he found no impairment under the AMA guidelines. Cumulative fatigue disorder was said to be synonymous with repetitive strain disorder and/or overuse syndrome. Particularly emphasizing the fact that Scearce had reported no improvement in her condition during her long period .of unemployment, Dr. Kasdan opined that claimant's disorder was probably not work-related as cumulative trauma. disorders generally improve with rest. Dr. Dennis O'Keefe, a neurologist, joined in Kasdan's opinion that nerve conduction studies were normal and that cumulative trauma injuries generally resolve with rest. He observed that the cause and symptoms of cumulative trauma syndrome are subjects of great contention. He found nothing upon Scearce's examination to lead him to believe that she had thoracic outlet syndrome.

As pertinent to the issue of causation, the ALJ found:

> As it relates to the issue of causation, the Plaintiff's testimony regarding the physical requirements of her sewing machine operator job convinces this Administrative Law Judge that she has suffered an injury caused by the repetitive motion of her hands, wrists, arms and shoulders. This is the type of repetitive trauma injury referenced by the Court in the case *Haycraft* v. *Corhart Refractories Company*, Ky. 544 S.W.2d 222 (1977). Plaintiff's testimony is unrefuted about her average production level equalling 200%. She also testified that this job was performed eight to nine hours per day six days per week and the Plaintiff's probative testimony on the issue of causation is found to be conclusive due to the supporting testimony of Dr. Aaron, Dr. Reddy, Dr. DeSimone and Dr. Kasdan.

Union filed Petition-for Reconsideration arguing that there was no evidence to establish work-relatedness. The ALJ overruled the Petition in an Order dated March 25, 1992, wherein Dr. Kasdan's positive finding upon Phalen's test and his prediction that the claimant would have problems with a return to rapid repetitive work were cited as evidence supportive of the ALJ's conclusion.

Quite naturally on appeal Union contends that while the respondent's testimony may be relevant as to the extent and duration of occupational disability, the matter of causation must be established by medical opinion to a reasonable degree of probability. In response, Scearce counters that the totality of the evidence and circumstances surrounding her condition and the nature of the work constitute sufficient evidence upon which the ALJ could reasonably draw an inference of work-relatedness. Both litigants cite *Markwell & Hartz, Inc.* v. *Pigman*, Ky., 473 S.W.2d 842 (1971) as definitive case authority. Therein it is written:

> We do not mean to suggest that the opinion of a medical expert is always necessary to support a claim or that such opinions, when provided, are inevitably determinative one way or the other. 473 S.W.2d at 846.

As support for what may be referred to as claimant's totality of the circumstances theory, *Blair Fork Coal Company* v. *Blankenship*, Ky., 416 S.W.2d 716 (1967) is cited. Therein it is written:

> A claim for compensation under the Workmen's Compensation Act may be established by circumstantial evidence '. . . when the facts and circumstances detailed are so related to each other, that an inference of liability may be fairly drawn and without being based merely upon guess or surmise.' . . . 'The proof, it is true, may be direct, presumptive, or circumstantial, but legal proof, nevertheless, it must be.' (citations omitted) 416 S.W.2d at 718.

In *Markwell & Hartz, Inc.* v. *Pigman, supra*, the former Court of Appeals ultimately determined that the claimant must submit the reasoned opinion of a medical expert in order to establish a causal nexus between a hearing loss and excessive noise exposure through the use of a jackhammer at work. This was so even though the onset of deafness was sudden and temporally associated with the work. Moreover, Pigman had presented as evidence the opinion of an otolaryngologist to the effect that there could be a causative relationship between jackhammer noise exposure and deafness.

In *Blankenship*, survivors of the worker successfully prosecuted a compensation claim for benefits arising from his death in an underground mine. Somewhat mysteriously, Blankenship, who was apparently in good prior health, was found dead in the mine with neither wounds nor burns upon his body, yet near a live electrical wire. A physician who examined the deceased stated that he had no idea what caused Blankenship's death. The Court of Appeals held that the evidence as a whole created a justifiable inference that Blankenship's death resulted from accident and injury. The Court particularly noted that a death certificate listing the cause as electrocution constituted prima facie, but not conclusive, evidence.

Certainly the ALJ as trier of fact is empowered to draw reasonable inferences from the totality of the evidence.

Jackson V. *General Refractories Company*, Ky., 581 S.W.2d 10 (1979). And where his ultimate findings are supported by substantial evidence they may not be disturbed upon appeal. *Smyzer* v. *B. F. Goodrich Chemical Company*, Ky., 474 S.W.2d 367-(1971) and *Special Fund v. Francis*, Ky., 708 S.W.2d 641 (1986). Admittedly, upon the claim .sub judice, there is voluminous circumstantial evidence establishing at least a temporal nexus between the repetitive work activity accomplished by the claimant at Union and the development of symptoms in her neck, shoulders and upper extremities. However, the association between the reported impairment and the work is not such as would be evident to a layman. As observed by the Court of Appeals in *Markwell & Hartz, Inc.* v. *Pigman*, supra, the instant claim is not comparable to one where a man has been shot in the head and dies immediately thereafter. We are unable to distinguish the instant claim from *Markwell & Hartz, Inc.*, the net effect of which is to constrain the degree to which the workers' compensation trier of fact can draw inferences with respect to causation. The association between repetitive work activity and over use syndromes or conditions, e.g. carpal tunnel syndrome and thoracic outlet compression, is perceived by some as a matter of common knowledge. However, we believe that the ALJ is precluded from making determinations as to medical matters by resorting to what may be deemed public knowledge. Instead, the ALJ must turn to the proof in a given case. In the claim sub judice, the opinions of Drs. Kasdan and O'Keefe that Scearce's condition is not work-related are uncontradicted by countervailing medical testimony. Such uncontradicted opinion evidence from the medical experts cannot be summarily cast aside by the trier of fact. *Mengel* v. *Hawaiian-Tropic Northwest and Central Distributors, Inc.*, Ky.App., 618 S.W.2d 184 (1981).

Therefore, following established case precedent, absent a reasoned medical opinion establishing a causal nexus between the work and the impaired condition, there is no substantial evidence to support a finding of work-relatedness.

The decision of the ALJ is therefore REVERSED and the matter is REMANDED with direction to enter an order of dismissal. This renders moot Union's appeal relative to the submission of medical reports as evidence.

ALL CONCUR.

COUNSEL FOR PETITIONER:
Hon. Joy D. Denton P. 0. Box 1270
Bowling Green, KY 42102-1270

COUNSEL FOR RESPONDENT:
Hon. Morris Butler
P. 0. Box 280
Greensburg, KY 42743

Hon. William A. Miller Sr.
17th Floor Kentucky Home Life Bldg.
Louisville, KY 40202-3269

ADMINISTRATIVE LAW JUDGE:
Hon. Thomas A. Dockter
624 West Main Street
4th Floor, The Meyer Building
Louisville, KY 40202

RENDERED: SEPTEMBER 24, 1993; 10:00 A.M.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 92-CA-002648-WC

MARY KAY SCEARCE - - - - - - - - *Appellant*

v.

UNION UNDERWEAR COMPANY, INC.
d/b/a FRUIT OF THE LOOM and
WORKERS' COMPENSATION BOARD - - - *Appellees*

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION No. WC-89-00667

and

No. 92-CA-002789-WC

UNION UNDERWEAR COMPANY, INC.
d/b/a FRUIT OF THE LOOM - - - *Cross-Appellant*

v.

MARY KAY SCEARCE and
WORKERS' COMPENSATION BOARD - - *Cross-Appellees*

CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION No. WC-89-00667

AFFIRMING IN PART AND REVERSING IN PART

BEFORE: GARDNER, GUDGEL, and JOHNSON, Judges.

GARDNER, JUDGE: Mary Kay Scearce (Scearce) appeals from an order of the Workers' Compensation Board (the board) which reversed the Administrative Law Judge's

(ALJ) award of permanent partial disability benefits. Union Underwear Company, Inc. (Union) cross-appeals. We affirm in part and reverse in part.

Scearce began working for Union as a sewing machine operator in approximately 1966. Her duties at Union included the binding of garments which necessitated repetitive arm and hand movements. In 1986, while still at Union, Scearce began experiencing pain in her upper extremities. She sought medical treatment, and continued to work for approximately three years. In late 1989, her condition became progressively worse and she quit her employment.

Scearce subsequently filed a claim for workers' compensation benefits, and the matter went before the ALJ. Scearce offered into evidence the medical reports of three examining physicians, each of whom found her to be suffering from tingling and numbness in the upper extremities, thoracic outlet compression, or other related disorders. Union also presented medical testimony from three examining physicians. One doctor opined that Scearce was not suffering from a disabling condition which necessitated her release from work, and the other two were in general agreement that she was suffering a repetitive trauma disorder but that it was not work-related as it had not improved during her long period of unemployment.

Upon considering the proof, the ALJ determined that Scearce had suffered a work-related debilitating injury and awarded her permanent partial disability benefits. As to the issue of causation, the ALJ found that while there was no direct medical evidence linking the injury to the employment, the causal link had nevertheless been sufficiently established by the totality of the evidence. Union's subsequent petition for reconsideration was denied, and it appealed to the board. Upon considering the matter, the board concluded that the causal nexus connecting Scearce's employment to her injury had not been established by substantial evidence, and the ALJ's order awarding benefits was reversed and remanded. This appeal followed.

The primary issue now before us relates to the question of causation. Scearce maintains that the totality of the evidence presented to the ALJ inevitably leads to the conclusion that her repetitive strain disorder resulted from her years of employment with Union, and that the board therefore had no authority to set aside the award. Union argues in response that established case precedent mandates the presentation of medical testimony which establishes a causal nexus between the work and the impaired condition, and in the lack thereof the ALJ may not award disability benefits. Having carefully studied the facts and the law, we agree with Scearce and must reverse on this issue.

While it is true that the mere possibility of a causal connection between the employment and the injury is not enough to support a finding of such a connection as a fact, *Markwell & Hartz, Inc.* v. *Pigman*, Ky., 473 S.W.2d 842 (1971), citing *Kelly Contracting Company* v. *Robinson*, Ky., 377 S.W.2d 892 (1964), it is also well established that "[m]edical evidence . . . must be considered not as determinative but rather as part of the totality of circumstances upon which the board [now ALJ] must make the factual determination [with respect to causation] . . ." *Hudson v.* Owens, Ky., 439 S.W.2d 565, 569 (1969). In the case at bar, the medical evidence connecting Scearce's employment to her disability is tenuous. We believe the evidence when viewed as a whole, however, is nevertheless sufficient to establish the necessary causal nexus. It is uncontroverted that Scearce worked for more than twenty years in a position requiring repetitive arm and shoulder movement, that the onset of her condition occurred during her employment, and that the condition from which she suffers is compatible with the repetitive movements the job required. Furthermore, the record reveals that at least one treating physician, namely Dr. Phillip R. Aaron, expressly opined that the injury was work-related. The question on which this appeal turns, however, is whether the findings of the ALJ were supported by substantial evidence. *Special Fund*

v. Francis, Ky., 708 S.W.2d 641 (1986); *Bethenergy Mines, Inc. v. Easterling*, Ky. App., 776 S.W.2d 842 (1989). Substantial evidence is that which would tend to induce conviction in the minds of reasonable men. *Smyzer* v. *B. F. Goodrich Chemical Company*, Ky., 474 S.W.2d 367 (1971). Having studied the record, we believe the evidence on which the ALJ based his findings could reasonably be characterized as substantial. Accordingly, we must reverse on this issue.

Union also cross-petitioned below, arguing that KRS 342.033 and 803 KAR 25:011 §13, which provide for the use of Form 107 to introduce medical evidence before the ALJ, are unconstitutional as they deny the respondent the opportunity to cross-examine the maker of each report. The board found this issue to be moot in light of their reversal, and Union now cross-petitions for review of that decision.

Union's argument that it was not availed of the opportunity to cross-examine Scearce's treating physicians is without merit. Neither KRS 342-033 nor 803 KAR 25:011 §13 prevent such cross-examination. Union could have deposed any or all of the physicians, but chose not to do so. While it argues that it was denied the opportunity to cross-examine the physicians, the corpus of its argument is that it doesn't wish to bear the cost for that cross-examination. We are aware of no statutory law or caselaw within this jurisdiction which compels that the cost of cross-examination be borne by the claimant. If a respondent employer wishes to cross-examine a treating physician it may certainly do so, but it must bear the cost. The purpose of the amended workers' compensation statute is to provide for the swift and inexpensive resolution of compensation claims. *See generally*, William Haynes, *Kentucky Jurisprudence—Workers' Compensation*, S 1.4 (1986). Shifting the cost of cross-examination to the claimant would do nothing to further that purpose.

Union has cited a number of out-of-state cases in support of its position. The most recent, namely *Paco* v. *Ameri-*

can Leather Mfg. Co., 516 A.2d 623 (N.J. 1986), stands for the proposition that a failure to allow cross-examination is a denial of due process. It went on to note that the compensation judge is vested with the statutory authority to allocate the medical experts' fees between the petitioner and respondent. In the case at bar, however, Union was never denied the opportunity to cross-examine Scearce's treating physicians. 803 KRS 25:011 §13(10) expressly states that "If a written medical report is admitted as direct testimony, any adverse party may depose the physician making the written report as cross-examination concerning it, and the deposition shall be filed as proof without a motion" Unlike Paco and the other cases cited, Union was availed of the opportunity to cross-examine Scearce's physicians. It simply chose not to do so.

Union next argues that use of Form 107, which allows for the submission of unsworn medical testimony, is violative of CR 43.04(l). That rule requires that testimony in a civil proceeding be given under oath. The rule is effective, however, "unless otherwise provided by these rules or by statute" CR 43.04(l). Use of Form 107 falls within this exception, we believe, as the administrative regulation which provides for the use of Form 107 was promulgated in accordance with express statutory authorization. See KRS 342.033, which provides that "[t]he board shall promulgate administrative regulations prescribing the format and content of written medical reports." As a safeguard against the introduction of false information in an unsworn medical report, the employer may depose the physician and cross-examine him or her under oath. 803 KAR 25:011 §13.

Union also argues that use of Form 107 is improper because it elicits conclusions from the witness which should be reserved for the ALJ, i.e., whether the claimant's functional impairment will have an occupational implication greater than the functional impairment assessed. This extraneous information, it contends, renders Form 107 constitutionally infirm. We believe the so-called "residuum

rule" is dispositive of this issue. It provides that "findings of an administrative agency will be upheld despite its partial reliance upon incompetent evidence if it also had before it competent evidence which by itself would have been legally sufficient to support the findings." *Haste* v. *Kentucky Unemployment Insurance Commission*, Ky. App., 673 S.W.2d 740 (1984), citing *Big Sandy Community Action Program v. Chaffins*, Ky., 502 S.W.2d 526 (1973). As there was sufficient legally competent evidence in the record to support the ALJ's find of occupational disability, we cannot find that the alleged presence of extraneous information in the Form of 107 gives rise to reversible error.

Finally, Union argues in very general terms that KRS 342.033 and 803 KAR 25:011 §13 are unconstitutionally vague and therefore void. As it cites no authority in support of this proposition, we do not find this argument to be persuasive. *See Pierson* v. *Coffey*, Ky. App., 706 S.W.2d 409 (1985).

For the foregoing reasons, the order of the Workers' Compensation Board is reversed as it relates to Scearce's claim for benefits, and in all other respects is affirmed.

ALL CONCUR.

ATTORNEY FOR APPELLANT/CROSS-APPELLEE MARY SCEARCE:

Morris Butler
Greensburg, Kentucky

William A. Miller, Sr.
Louisville, Kentucky

ATTORNEY FOR APPELLEE/CROSS-APPELLANT UNION UNDERWEAR:

Joy D. Denton
Bowling Green, Kentucky

SUPREME COURT OF KENTUCKY

93-SC-000865-WC

UNION UNDERWEAR COMPANY, INC.
d/b/a FRUIT OF THE LOOM - - - - - *Appellant*

v.

MARY KAY SCEARCE and
THOMAS A. DOCKTER, ADMINISTRATIVE
LAW JUDGE, WORKERS' COMPENSATION BOARD - *Appellee*

COURT OF APPEALS
92-CA-2648
WC-89-667

ORDER DENYING PETITION FOR REHEARING

Appellant's petition for rehearing of this Court's opinion rendered February 16, 1995, is denied.

All concur. Lambert, J., not sitting. Special Justice Gillum sitting.

ENTERED May 11, 1995.

/s/ Robert F. Stephens
Chief Justice

FORM 101
Adopted April 19, 1988
Application for Adjustment of Claim
(Injury)

DEPARTMENT OF WORKERS' CLAIMS
WORKERS' COMPENSATION BOARD
Frankfort, Kentucky 40601

INSTRUCTIONS - This form is adopted for use in all applications for adjustment of injury claims filed with the Board pursuant to K.R.S. 342.270, and is intended to standardize and facilitate procedures in adjusting injury claims.

The Board is authorized by K.R.S. 342.260 to adopt rules of procedure, including this form. Before completing and filing this form, please review the provisions of 803 KAR 25:011, which relates to use of this form.

Parties may appear in this claim either in person or by an attorney. If any person elects to represent himself, he shall be held accountable in the same manner and same degree as would an attorney representing him.

When this form is filed, several other forms must be filed with it. These are: 1) a complete medical history (Form 105); 2) a complete work history (Form 104); and 3) a waiver and consent to release of medical information (Form 106); and 4) a medical report which describes the injury which is the basis of the claim. This medical report may be filed using Form 107, but use of that form is not required so long as the report is legible.

This form may be filed in combination with an Application for Adjustment of an Occupational Disease Claim (Form 102) or an Application for Retraining Incentive Benefits (Expedited Procedure) (Form 103) if both benefits are sought.

Original and enough completed copies of all the material listed above, including this form, to serve on all named defendants, and the administrative law judge, must be sent to the Board. The address is: Workers' Compensation Board, Department of Workers' Claims, Frankfort, Kentucky 40601.

If you have any questions concerning this form, please call (502) 564-5550 to discuss your questions.

WORKERS' COMPENSATION BOARD

CLAIM NO. 89-00667

Mary Kay Scearce
394 Blake Street
Columbia, KY 42728
Plaintiff

S.S.# 407-70-5401

vs.

Farley Industries/Fruit of the Loom
P.O. Box 170
Jamestown, KY 42629
Defendant/Employer

and

Travelers Insurance Co.
P.O. Box 1131
Louisville, KY 40201
Defendant/Insurer

and

Other Defendant (if any)

RECEIVED
AUG 06 1990
DEPARTMENT OF
WORKERS' CLAIMS

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WORKERS' CLAIMS

APPLICATION FOR ADJUSTMENT OF CLAIM

1. On the 22nd (time) day of February (month) 19 88 (year)

Mary Kay Scearce (name of injured person) was injured (injured or killed) by reason of an accident arising out of and in the course of her employment by Farley Industries/Fruit of the Loom (employer)

2. The following is a statement of particulars relative to the accident:

A. Name of injured employee Home address County of Residence Occupation Age Birthdate	Mary Kay Scearce 394 Blake Street, Columbia, KY 42728 Adair County, Kentucky Machine Operator 40 January 8, 1950
B. Name of employer Address (main office) Place of Business Business Address (Kentucky)	Farley Industries/Fruit of the Loom P.O. Box 170, Jamestown, KY 42629 Jamestown, KY 42629 P.O. Box 170, Jamestown, KY 42629
C. Name and address of all other parties to the application and the reason why each is joined.	Travelers Insurance Co. P.O. Box 1131 Louisville, KY 40201 Employer's Insurance carrier
D. Name and address of the employer's insurance carrier, if known.	Travelers Insurance Co. P.O. Box 1131 Louisville, KY 40201
E. Place of accident (City, County and State)	Jamestown, Russell County, Kentucky
F. Nature of the work being done by the injured person at the time of the accident.	Machine Operator
G. How did the accident occur? (Describe in detail.)	Repetitive motion in operating machine
H. Nature of the injury. (Describe in detail.)	Carpal tunnel to left and right wrist. Pinched nerve in right arm, shoulder and neck.
I. Has the injured person fully recovered? If so, when?	No Yes
J. Was medical and surgical treatment required? Was it furnished by the employer? If not, did the employer have an opportunity to furnish it?	Yes Yes
K. Names and addresses of treating physicians.	Dr. Morron Kasdan, 4006 Dupont Circle, Louisville, Kentucky, Dr. Richard Miles, Russel Springs, KY, Dr. Lovegildo Garcia, Woodland Medical Clinic, Elizabethtown, KY 42701, Dr. Narasimha Reddy, 1310 N. Race Street, Glasgow, KY 42141, Dr. Phil Aaron, 300 Bomar Heights, Columbia, KY 42728, Dr. Mohammed Siddiqui, Helmwood Medical Center, Elizabethtown, KY 42701

L. Wages of the employee at the time of the accident. (State whether paid by day, week, month or year.) How long did the injured person work for the employer at this wage prior to the accident? State whether employment was for 5, 5½, 6 or 7 days per week.	$422.00 per week Had worked there for 23 years. 5½ days per week at 9 hrs. a day.
M. Amount injured person is earning or is able to earn in some suitable employment or business after the accident.	None.
N. Payment, allowance or benefit received from employer, directly or indirectly to provider.	$ Unknown for ..... weeks medical care and attendance $ Temporary total disability benefits in the amount of $281.60 per week for 11-88 to 4-89 and 9-5-89 to 6-12-90 disability compensation.
O. Additional amounts claimed as compensation.	$ ..... for ..... weeks medical care and attendance. $ ..... per week for ..... weeks disability compensation

Total disability benefits from 6-13-90

(Itemize on a separate sheet all bills for medical care and attendance previously paid by the injured person and not reimbursed. If the purpose for this application is to adjust a claim for medical expenses or funeral expenses, itemize on a separate sheet all such creditors and the amount of the claims if known.)

P. When was the employer notified of the accident?	Immediately on February 22, 1988
Q. If the employer was not notified promptly after the date of the accident, give the reason for the failure to notify the employer.	N/A
R. State the name, date of birth, address and relationship of all dependents.	Tommy Scearce 394 Blake Street Columbia, KY 42728 Husband dob: 5-23-49

3. A dispute has arisen which prevents settlement of the claim which has resulted from the accident described at paragraph 2 above. The specific nature of the dispute is: (check one or more)

a. ☐ The employer denies liability for compensation in whole or in part.

b. ☒ The parties cannot agree concerning the amount or duration of compensation payable.

c. ☐ The parties cannot agree concerning the rate of compensation payable.

d. ☐ It is uncertain who is the proper person to receive payments.

e. ☐ Other (Describe specifically.)

.....

.....

.....

.....

.....

4. The plaintiff is seeking interlocutory relief while his claim is in process of consideration for adjustment. The specific nature of the relief sought is: (Check one or more)

a. ☐ Payment of income benefits while the claim is pending because of total disability.

b. ☐ Payment of medical and hospital expenses while the claim is pending.

c. ☐ Provision of rehabilitation services while the claim is pending.

Appropriate affidavits are attached to show that plaintiff is eligible for the interlocutory remedies being sought and that plaintiff will suffer immediate and irreparable injury if the remedies are not granted.

PARAGRAPH 4 IS OPTIONAL.
IF NO INTERLOCUTORY RELIEF IS BEING SOUGHT DO NOT COMPLETE THIS PARAGRAPH.

WHEREFORE, plaintiff prays that the defendants be required to answer this application; that a time and place be fixed for a hearing and notice given to all parties, and that the Board, through its administrative law judge, enter an order or award granting such relief as this applicant may be entitled to in the premises.

Dated at Greensburg, Kentucky

this 27th day of July 19 90

Signed Mary Kay Scearce
Mary Kay Scearce

Address 394 Blake Street, Columbia, KY 42728

.....Mary Kay Scearce..... plaintiff herein being duly sworn, says that the statement of the foregoing application are true.

Subscribed and sworn to before me, this 27th day of July 19 90

Morris Butler
(Notary Public or other authorized officer)
Notary Public, State at Large, KY

My commission expires October 2, 1992 : County Green

PREPARED AND SUBMITTED BY:

BUTLER, BUTLER & HUDSON
202 W. Court St., P.O. Box 280
Greensburg, KY 42743
(502) 932-4821

ATTORNEY FOR PLAINTIFF

Morris Butler
Morris Butler

FORM 104
Adopted April 19, 1988
Plaintiff's Employment History

DEPARTMENT OF WORKERS' CLAIMS
WORKERS' COMPENSATION BOARD
FRANKFORT, KENTUCKY 40601

Instructions

Please complete this form as accurately as possible, giving your complete adult employment history. It is especially important to include the address of the employer and how long you worked there.

If you have been employed as a coal miner, please be sure to say whether the mines you worked at were strip mines or underground mines.

Name				Social Security Number	
Mary Kay Scearce				407-70-5401	
Name and Address of Employer	Type of Industry	Occupation	Period of Employment Mo/Yr	Mo/Yr	Exposure to dust, gases or fumes? (Yes/No)
1. Farley Industries/ Fruit of the Loom	Clothing Mfg.	Machine Operator	1-67	Until Injury	No
2.					
3.					
4.					
5.					
6.					

I hereby certify that the information given me on and in connection with this form is true and correct to the best of my knowledge and belief.

Signature of Plaintiff	Date
Mary Kay Scearce	7-27-90

Mailing Address	City and State	Zip Code
394 Blake Street	Columbia, KY	42728

FORM 106
Adopted April 19, 1988

DEPARTMENT OF WORKERS' CLAIMS
WORKERS' COMPENSATION BOARD
FRANKFORT, KENTUCKY 40601

MEDICAL WAIVER AND CONSENT

I, Mary Kay Scearce, having filed a claim for workers' compensation benefits, do hereby waive any physician-patient, psychiatrist-patient, or chiropractor-patient privilege I may have and hereby authorize any physician, psychiatrist, chiropractor, podiatrist, hospital or health care provider to furnish to Workers' Compensation Board any information or written material reasonably related to my work-related injury or my past relevant medical history.

The authorization includes, but is not restricted to, a right to review and obtain copies of all records, x-rays, x-ray reports, medical charts, prescriptions, diagnoses, opinions and courses of treatment.

This authorization shall remain valid for 180 days following its execution. A photocopy of the authorization may be accepted in lieu of the original.

Signed at Greensburg, Kentucky, this 27th day of July, 1990.

Mary Kay Scearce
Patient Mary Kay Scearce

Social Security No.: 407-70-5401

Donna E. Doheney
Witness

Pursuant to KRS 342.020(4) any physician, psychiatrist, chiropractor, podiatrist, hospital or health care provider shall, within a reasonable time, provide the requesting party with any information or written material reasonably related to the injury for which the employee claims compensation.

[LETTERHEAD OF AARON MEDICAL CENTER]

July 20, 1990

Mr. Morris Butler
Attorney At Law
202 West Court Street
P. O. Box 280
Greensburg, Kentucky 42743

RE: Mary Kay Scearce
DOB: 01-08-50
SS#: 407-70-5401

Dear Mr. Butler:

In regard to your request of 07-05-90, I am pleased to submit the following information:

Mrs. Mary Kay Scearce, a 40 year old female, has been seen by providers at Aaron Medical Center since February, 1985. On 02-22-88, she presented with complaints of pain in her right arm and shoulder and the right side of her neck, with swelling and numbness in both of her hands. She had these problems for 2 years prior to this time, but for the last 3 months her symptoms had gotten worse. She was diagnosed as having tendonitis in her right shoulder. Mary Kay Scearce has been one of the hardest-working and most productive employees, in what she does, that they have ever had at Fruit of the Loom. She has worked extremely hard and been a very good employee; her productivity, as she relates to me, had been one of the highest in the plant. This woman, through the repetitive motion nature of her job, has totally and permanently injured her right arm, right shoulder, and neck.

Since that time, she has been seen 1-2 times per month and has been treated for tendonitis, carpal tunnel syndrome and neck pain. I have prescribed Tylenol #3, to be taken one every 4-6 hours, as needed, for pain.

She has done everything that has been asked of her; she has gone to an orthopedic surgeon, and has gone to

physical therapy. She has gone to work hardening programs, yet she remains unable to return to work in any capacity. This very deserving patient has been injured in her job to the point that she is unable to return to work at Fruit of the Loom, or any other position, because of this severe injury. As a result of this work-related injury, she is totally and permanently disabled.

The last time she was seen in our office was on 06-27-90. She was referred to Dr. Narasimha Reddy, Orthopedic Surgeon, Glasgow, Kentucky, on this date.

If I can be of further assistance please feel free to contact my office.

Sincerely,
/s/ Phillip R. Aaron
Phillip R. Aaron, M.D., J.D., M.P.H.

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS

Claim No. 89-00667

MARY KAY SCEARCE - - - - - - - - *Plaintiff*

v.

FRUIT OF THE LOOM - - - - - - - - *Defendant*

MOTION TO FILE MEDICAL REPORT

Comes the Plaintiff, Mary Kay Scearce, by counsel, and hereby moves the Board pursuant to KRS 342.033, and the Kentucky Workers Compensation Board of Rules of Procedure, 803 KAR 25:011, §13, to file as evidence the medical report of Dr. Oris Aaron, dated August 31, 1990 attached hereto.

WHEREFORE, Plaintiff koves that the report of Dr. Oris Aaron dated August 31, 1990, copy attached hereto, shall be filed in this proceeding and shall be considered as evidence in this case to the same extent as if Dr. Aaron had personally appeared and testified as set forth in such report. Subject to the Defendant's right of cross-examination.

THIS 31st day of October, 1990.

Butler, Butler & Hudson
202 W. Court St., P.O. Box 280
Greensburg, KY 42743
Phone: (502) 932-4821
Attorneys for Plaintiff

/s/ Morris Butler
Morris Butler

Copies forwarded to:

Hon. Thomas A. Dockter
Administrative Law Judge
P.O. Box 3167
Louisville, KY 40201-3167

Hon. Joy Denton
Attorney for Defendant
P.O. Box 1270
Bowling Green, KY 42102-1270

Original forwarded to:
Workers' Compensation Board
Perimeter Park West
1262 Louisville Road, Bldg. C
Frankfort, KY 40601

/s/ Morris Butler
Of Counsel for Plaintiff

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS

Claim No. 89-00667

MARY KAY SCEARCE - - - - - - - - *Plaintiff*

v.

FRUIT OF THE LOOM - - - - - - - - *Defendant*

DEFENDANT'S DEMAND OF RIGHT OF CROSS-EXAMINATION AND MOTION TO PRODUCE PHYSICIAN, AND OBJECTION TO ADMISSIBILITY OF MEDICAL REPORT

Plaintiff has filed a motion to submit the medical report of Dr. Oris Aaron dated August 31, 1990, as direct testimony pursuant to KRS 342.033. Pursuant to that same statute, Defendant demands the right to cross-examine Dr. Aaron and demands that Plaintiff be required to produce Dr. Aaron for cross-examination at a reasonable time at the expense of Plaintiff as a prerequisite to the admissibility of Dr. Aaron's report. In addition, Defendant, pursuant to KRS 342.033, objects to the admissibility of said report and, pursuant to 803 KAR 25:011, Section 13(8), states the grounds for the objection herein. In the following portions of this pleading, we will first point out in Section I the reasons Defendant has an absolute right to cross-examine Dr. Aaron and why such an absolute right requires that Plaintiff be required to schedule and pay for the depositions which will provide the right of cross-examination to Defendant. Stated simply, unless the right of cross-examination is absolute and unless the burden of furnishing the opportunity to exercise the right is borne by Plaintiff, KRS 342.033 is unconstitutional as a denial of due process of law, an improper delegation of

legislative authority, and void for vagueness. After discussing the absolute right of Defendant to cross-examine Dr. Aaron, we will note with particularity the objections to his report in Section II below.

I.

DEFENDANT HAS AN ABSOLUTE RIGHT TO CROSS-EXAMINE DR. AARON; THE BURDEN OF SCHEDULING AND PAYING FOR SUCH CROSS-EXAMINATION RESTS UPON THE PLAINTIFF.

A long line of Kentucky cases, including *Brooks* v. *Island Creek Coal Company*, Ky.App., 678 S.W.2d 791 (1984), hold that the Workers' Compensation Act should be interpreted in a manner which will render it constitutional rather than unconstitutional. Thus, if the constitutional guarantee of due process would require that before the medical report of Dr. Aaron may be considered as evidence the Defendant must be provided an absolute right to cross-examine Dr. Aaron at the expense of the Plaintiff, then the Act should be so interpreted and applied.

It is well established in Kentucky law that the right of cross-examination is a fundamental adjunct of due process and must be provided in administrative proceedings which are adversarial in nature. *Kaelin* v. *City of Louisville*, Ky., 643 S.W.2d 590 (1982). *Black Mountain Corporation* v. *Williams*, Ky., 193 S.W.2d 416 (1946) , holds that evidence produced in workers' compensation proceedings must be in a form authorized by customary legal procedures. The appellate courts of other states as well have recognized that while the evidentiary rules in an administrative proceeding may be relaxed, they cannot be relaxed to a point of dispensing with the right of cross-examination which is fundamental in Anglo-Saxon law. *Employers Commercial Union Insurance Group* v. *Schoen*, Alaska, 519 P.2d 819 (1974). In fact, the United States Supreme Court has recognized that the right to cross-examine an adverse party in administrative proceedings is constitutionally protected. *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d

287 (1970). Likewise, the Supreme Court of Montana, in *Hert* v. *J.. J. Newberry Company*, Mont., 587 P.2d 11 (1978), held that every party to a workers' compensation proceeding has an absolute right to cross-examine adverse witnesses as part of the due process requirements imposed in workers' compensation proceedings.

Given that there is an absolute right to cross-examine adverse witnesses in workers' compensation cases, the question which next arises in connection with medical reports such as that of Dr. Aaron is: who is to bear the responsibility of producing the witness (by scheduling the witness's deposition) and defraying the expenses incurred in providing the opportunity to cross-examine. Although it appears that there is no guiding authority responsive to this question in the jurisprudence of Kentucky, other states have had the opportunity to examine the question under similar circumstances and statutes, and have determined that the proponent of the medical report must make the author of the report available for cross-examination and must bear the expense of providing the opportunity of cross-examination to the adverse party. In *Hert* v. *J. J. Newberry Company, supra*, the Supreme Court of Montana stated:

> Thus, it is the duty of any party before the Workers I Compensation Court, whether he be worker, employer, or carrier, if that party intends to rely on the medical evidence in a written medical report, to present the medical person or expert who is the author of the same for cross-examination either by deposition or by testimony at the hearing. 587 P.2d at 13.

Likewise, the Court of Appeals of Oregon, in *Hanna* v. *McGrew Bros. Sawmill, Inc.*, Ore.App., 605 P.2d 724 (1980), states:

> The procedure of offering medical testimony through the medium of written reports does not alter the status of the witness when he is called for the purposes of cross-examination. He still remains the witness of the party offering the medical reports and that party is responsible for paying the fees and expenses incident to his appearance as a witness for cross-examination. 605 P.2d at 728.

Again, the Rhode Island Supreme Court, in *Drake Bakeries, Inc.* v. *Butler*, R.I., 178 A.2d 295 (1962), states:

> The proceedings under the Workmen's Compensation Act are necessarily adverse in nature, and the parties are free to produce such evidence and testimony as they deem essential to the interest of their respective causes. The cost of producing such evidence or testimony properly falls on the producing party. 178 A.2d at 299.

The appellate courts of many other states have rendered similar decisions. However, in order to avoid unnecessarily lengthening this response, we will simply cite some of the appellate decisions of other states which recognize that it is the duty of the proponent of a medical report to produce the author of the report for cross-examination and to defray the expenses incurred in connection with such cross-examination. These cases include: *Commercial Union Companies* v. *Smallwood*, Alaska, 550 P. 2d 1261 (1976) ; *Chavez* v. *Industrial Commission*, Ariz., 425 P.2d 864 (1967); *Doss v. American Ventures*, Inc., La., 224 So.2d 470 (1969); *Chambers v. Bigelow-Liptak Corp.*, Ark., 344 S.W.2d 588 (1961); and *Natalizia* v. *Atlantic Tubing & Rubber Co.*, R.I., 105 A.2d 190 (1954).

The fact that requiring the Plaintiff in the instant case to produce Dr. Aaron for cross-examination will cause the Plaintiff to incur additional monetary expense has been held an insufficient basis to dispose of the requirement that the proponent of evidence produce the witness f or cross-examination. As stated by the Superior Court of New Jersey in *Paco* v. *American Leather Mfg. Co.*, N.J. Super., 516 A.2d 623 (1986):

> The high cost of producing medical testimony, although a heavy burden for the injured employee to bear in some instances, simply cannot justify the trammeling of fundamental rights in a contested formal proceeding.

In like manner, the Arizona Court of Appeals, in *Jones* v. *Industrial Commission*, Ariz.App., 401 P.2d 172 (1965), states:

FORM 105
Adopted April 19, 1988

DEPARTMENT OF WORKERS' CLAIMS
WORKERS' COMPENSATION BOARD
FRANKFORT, KENTUCKY 40601

PLAINTIFF'S CHRONOLOGICAL MEDICAL HISTORY

Include all injuries and major illnesses to the date of filing of the claim.

	Name & Address of Physician or Hospital	Date Treatment Received	Nature of the injury or disease? Part of body affected? Still under Doctor's care?
1.	Dr. Phil Aaron 300 Bomar Heights Columbia, KY 42728	2-22-88 through 6-27-90	Injury to wrist & arm Still under Doctor's care
2.	Dr. Morton Kasdan 4006 Dupont Circle Louisville, YK	3-16-89	Injury to arm and wrist
3.	Dr. Richard Miles Russell Springs, KY	January 9, 1987 through April 22, 1989	Injury to arm and wrist
4.	Dr. Lovegildo Garcia Woodland Medical Clinic Elizabethtown, KY 42701	November 25, 1988	Injury to arm and wrist

7-27-90
DATE

Signed Mary Kay Scearce
Mary Kay Scearce Plaintiff

36a

> The party entitled to the right or "opportunity" for cross-examination should not be compelled to expend money or effort in obtaining that "opportunity".

We would note, further, that if KRS 342.033 were applied in such a manner as to allow the Workers' Compensation Board to adopt regulations which do not protect the absolute right of an adversary to cross-examine the proponent's witnesses at the expense of the proponent, then KRS 342.033 would violate the well-recognized prohibition against the delegation of legislative authority in the absence of standards or safeguards governing the exercise of such authority. See *Miller* v. *Covington Development Authority*, Ky., 539 S.W.2d 1 (1976), and *Butler* v. *United Cerebral Palsy of Northern Kentucky*, Inc., Ky., 352 S.W.2d 203 (1961). KRS 342.033, on its face, contains absolutely no standards or safeguards to govern the Board in promulgating regulations concerning the use of written medical reports as direct testimony. Unless the safeguard of an absolute right of cross-examination at the proponent's expense is implied in the statute, it is violative of the rule recognized in *Miller* and *Butler* and is unconstitutionally vague. Once again, since a constitutional interpretation and application of statutes is favored, *Brooks, supra*, KRS 342.033 must be interpreted so as to protect the absolute right of cross-examination at the expense of the proponent.

II.

OBJECTIONS TO THE ADMISSIBILITY OF DR. AARON'S MEDICAL REPORT.

In addition to demanding its right to cross-examine Dr. Aaron as set forth above, Defendant objects to the admissibility of said report on the following specific grounds pursuant to 803 KAR 25:011, Section 13(8):

A. Admission of Dr. Aaron's Medical Report amounts to allowing the proponent to introduce unsworn medical testimony in violation of due process requirements and Board regulations. The regulations which permit a medical report to be filed do not require that the medical report

be subscribed and sworn by the physician making the report, but simply require that the report be signed. Thus, in essence, the regulations which allow a medical report to be filed on Form 107 allow the introduction of unsworn medical testimony. Allowing the introduction of unsworn medical testimony is in conflict with 803 KAR 25:011 Section 16(l), which requires that the rules of evidence which apply generally in the Commonwealth of Kentucky shall apply in workers' compensation cases. CR 43.04(l) states the general rule and requires that testimony given in a civil proceeding be under oath.

To allow unsworn medical testimony in the form of the Form 107 report is thus in conflict with one of the most basic requirements of evidence law—that testimony be given under oath or affirmation in order for the testimony to be competent. Accordingly, the regulations which allow the introduction of unsworn medical testimony deprive those persons against whom such evidence is introduced of due process of law.

B. The Form 107 omits important issues from inquiry, most notably issues relevant to the apportionment of liability between the Employer and the Special Fund.

C. The Form 107 elicits inadmissible medical opinions from the witness. Question No. 3 of Section F of the Form 107 asks the medical witness to express an opinion as to whether the Plaintiff's functional impairment will have an occupational implication greater than the functional impairment assessed. In essence, this section of the Form 107 asks the medical witness to express an opinion as to occupational disability. Kentucky's courts have held on numerous occasions that a medical examiner should evaluate the impairment of bodily function, and the evaluation of occupational disability is a legal or administrative task. As stated in *Congleton Brothers, Inc.* v. *Farmer*, Ky., 399 S.W.2d 722 (1966):

> We consider it appropriate to repeat the admonition given in *Kilgore* v. *Goose Creek Coal Co.*, Ky., 392 S.W.2d 78, that, while a medical examiner should

> evaluate the impairment of bodily function, it is a legal or administrative task to evaluate occupational disability.

Kentucky's highest court has stated that the medical expert should confine his testimony to medical matters. As stated in *Griffith* v. *Blair*, Ky., 430 S.W.2d 377 (1968):

> We agree with appellee's contention that a medical expert may not usurp the function of the Board by giving testimony which, in the form of a medical opinion, expresses a legal conclusion.

The seminal case of *Osborne* v. *Johnson*, Ky., 432 S.W.2d 800 (1968), discusses the difference between functional impairment and occupational disability. Question No. 3 in Section F of the Form 107 clearly asks the medical witness to express an opinion as to occupational disability, thereby asking the medical witness to express an opinion upon matters concerning which the witness is not qualified as an expert.

Since the Form 107 elicits opinions which are violative of well-recognized evidentiary rules which apply in workers I compensation cases, we submit that the motion to submit the report of Dr. Aaron on said form should be overruled.

D. Under Section G of the Form 107 the witness is asked to assess the functional capacity of the Plaintiff. These questions are suggestive and do not allow the witness to express his or her own opinion. For example, there is no space provided in which the physician can indicate that the Plaintiff is able to lift 100 pounds or more. There is no space provided wherein the witness can, for example, express the opinion that the Plaintiff is able to lift 35 pounds or less.

The Form 107, rather than suggesting a list of responses from which the witness may choose, should simply solicit the witness's opinions.

E. In Question No. 2 of Section F of Form 107, it is suggested to the witness that the AMA Guidelines may not adequately assess the medical impairment of the Plain-

tiff. Rather than suggesting a response in this manner, the question should simply elicit the expert's opinion as to whether or not the AMA Guidelines adequately assess the medical impairment of the claimant. If the doctor does not feel that the AMA Guides adequately assess medical impairment in any particular case, the doctor should be asked to explain *why* the AMA Guides are not adequate.

III.

MOTION TO PRODUCE PHYSICIAN FOR CROSS-EXAMINATION

Comes now the Defendant, by counsel, and for its Motion for an Order from the Administrative Law Judge directing the Plaintiff to produce Dr. Aaron for cross-examination at the Plaintiff's expense, states as follows:

1. The Defendant moves the Administrative Law Judge for an Order directing the Plaintiff to produce Dr. Aaron for cross-examination by the Defendant at the Plaintiff Is expense, either by deposition or at the time of the hearing to be held in this case. In support of this motion, the Defendant incorporates herein by reference the authority cited herein in its "Demand of Right of Cross-Examination and Objection to Admissibility of Medical Report," above.

WHEREFORE, Defendant prays that the Plaintiff's motion to file the medical report of Dr. Aaron as direct testimony be overruled or that, in the alternative, this Defendant's absolute right to cross-examine Dr. Aaron be recognized and that the Plaintiff be directed to arrange for the deposition of Dr. Aaron at the Plaintiff's expense, either by deposition or at the hearing, as a prerequisite to the consideration of Dr. Aaron's medical report as evidence.

Respectfully submitted this ___ day of November, 1990.

HARNED, ANDERSON & BACHERT
324 E. 10th Ave.
P. 0. Box 1270
Bowling Green, KY 42102-1270
Telephone: (502)782-3938

By: _____
Joy D. Denton

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing were this ___ day of November, 1990, placed in the U. S. Mail addressed to the following:

BUTLER, BUTLER & HUDSON
Mr. Morris Butler
202 W. Court St., P. O. Box 280
Greensburg, KY 42743
Hon. Thomas A. Dockter
Administrative Law Judge
P. O. Box 3167
Louisville, KY 40201-3167

_____
Joy D. Denton

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS

Claim No. 89-00667

MARY KAY SCEARCE - - - - - - - - - *Plaintiff*

v.

FRUIT OF THE LOOM - - - - - - - - *Defendant(s)*

Hon. Morris Butler
P.O. Box 280
Greensburg, KY 42743
Attorney for Plaintiff

Hon. Joy Denton
P.O. Box 1270
Bowling Green, KY 42102
Attorney for Employer

ORDER

This claim is presented to this Administrative Law Judge for rulings upon two motions pending at this time.

The first motion is the Plaintiff's Motion to file Medical Report of Dr. Oris Aaron. This motion is filed pursuant to KRS 342.033 and Administrative Regulation 803 KAR 25:011, Sec. 13.

The Defendant has filed a demand of right of cross-examination, motion to produce physician and objection to admissibility of medical report. In that response and motion, the employer claims a constitutional right to cross-examine Dr. Aaron and this Administrative Law Judge, as well as Plaintiff's counsel, recognizes this right and it will be GRANTED. However, the other demands contained in the employer's motion, including the Plaintiff's alleged responsibility to produce said doctor for deposition and to pay for such deposition are hereby DENIED.

WHEREFORE, IT IS HEREBY ORDERED that Plaintiff's Motion to file the 107 Report of Dr. Oris Aaron into evidence in the within claim is hereby SUSTAINED,

subject to the right of the Defendant-Employer to cross-examine Dr. Aaron at its own expense.

The other motion which is pending is the previously filed motion for extension of time submitted by the Plaintiff. The employer filed a response requesting that it be allowed 30 days after the expiration of Plaintiff's proof time to file its proof. This motion by the employer is SUSTAINED and it is allowed to and including December 30, 1990 to file its proof in the claim. The Plaintiff is given to and including January 14, 1991 to file rebuttal proof if desired.

The Pre-Hearing Conference remains scheduled in this case for January 14, 1991.

DATED this 16th day of November, 1990.

/s/ Thomas A. Dockter
Thomas A. Dockter
Administrative Law Judge

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS

Claim No. 89-00667

MARY KAY SCEARCE - - - - - - - - - *Plaintiff*

v.

FRUIT OF THE LOOM - - - - - - - - - *Defendant*

MOTION TO FILE MEDICAL REPORT

Comes the Plaintiff, Mary Kay Scearce, by counsel, and hereby moves the Board pursuant to KRS 342.033, and the Kentucky Workers Compensation Board Rules of Procedure, 803 KAR 25:011, §13, to file as evidence the medical report of Dr. Narashimha Reddy, dated November 13, 1990 attached hereto.

WHEREFORE, Plaintiff moves that the report of Dr. Narashimha Reddy dated November 13, 1990, copy attached hereto, shall be filed in this proceeding and shall be considered as evidence in this case to the same extent as if Dr. Reddy had personally appeared and testified as set forth in such report. Subject to the Defendant's right of cross-examination.

This 19th day of November, 1990.

BUTLER, BUTLER, & HUDSON
202 W. Court St., P.O. Box 280
Greensburg, KY 42743
Phone: (502) 932-4821
Attorneys for Plaintiff

/s/ Morris Butler
Morris Butler

Original forwarded to:
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1262 Louisville Road, Bldg. C
Frankfort, Kentucky 40601

Copies to:
Hon. Thomas A. Dockter
Administrative Law Judge
P.O. Box 3167
Louisville, KY. 40201-3167

Hon. Joy Denton
Attorney for Defendant
P.O. Box 1270
Bowling Green, KY 42101-1270
Of Counsel for Plaintiff

/s/ Morris Butler
Of Counsel for Plaintiff

FORM 107
Adopted April 15, 1983
Medical Report
(Injury)

DEPARTMENT OF WORKERS' CLAIMS
WORKERS' COMPENSATION BOARD
FRANKFORT, KENTUCKY 40601

STANDARD FORM MEDICAL REPORT FOR INDUSTRIAL INJURIES

A. PATIENT INFORMATION (Please type or neatly print all responses)

1. Name and Address
Mary Kay Scearce
394 Blake Street
Columbia, KY 42728

2. Social Security Number
407-70-5401

3. Date of Exam(s)

4. Date of Birth
01-08-50

5. Treating Physician [X]
Evaluating Physician [X]

- Upon Whose Request: Morris Butler, Attorney at Law

- Date of Request: 09-24-90

B. PATIENT HISTORY

Include pertinent history of injury along with current treatment, hospitialization(s) and period(s) Claimant unable to work.

Patient was seen by me on March 4, 1988 for the firstttime. She told that she had pain in the neck and in the right upper extremity. She has had occasional pain, but this particular episode started 2 months prior to her visit to my clinic, while she was on the job. She was not hospitalized by me, but underwent an arthroscopy of the knee on September 13, 1990.

C. PHYSICIAL EXAMINATION

Include chief complaints and state all findings relative to the industrial injury.

Her present complaints include pain in the neck with radiation down into both lower extremities. She has diffuse bilateral paracervical spasm with a minimal to moderate range of motion.

D. SUMMARY OF DIAGNOSTIC TESTING

In the space below, check the applicable blocks next to any test results which you reviewed and relied upon to base your medical assessments or conclusions. Be sure to show the date of each test, and summarize results. Attach copy(s) of reports, if available.

	DATE	SUMMARY OF RESULTS
[ ] X-ray		X-ray taken by Dr. Phil Aaron shows good normal bony architecture.
[ ] EMG		EMG revealed subtle evidence of C-8,T-1 radiculopathy apart from bilateral carpal tunnel syndrome.
[ ] CT SCAN		CT scan not performed by me.
[ ] MYELOGRAM		Myelogram not performed.
[ ] MRI		MRI revealed a normal bony architecture and normal discs.
[ ] OTHERS		

E. SURGICAL PROCEDURES

Please specify (Attach Operative Note)

Surgery performed on her knee. My record do not indicate history of injury to the knee. She told me during a recent visit that she has had pain since 1988. Please find attached, a copy of the Operative Report.

F. IMPAIRMENT

1. Using the AMA's Physicians Guide to Evaluation of Permanent Impairment (1977 Edition), please translate the Claimant's condition to a percentage of whole body impairment:

   10 % whole body.

   NOTE: **Be sure to include all references to both Chapters 1 and 2 of the Guidelines. If Chapter 2 is not used, please specify why it is not appropriate in this evaluation.**

   What tables did you use in arriving at this percentage?

   Table 45 Page 41 Table _____ Page _____

   Table 46 Page 42 Table _____ Page _____

   Table 47 Page 43 Table _____ Page _____

   NOTE: **Please explain specifically how you arrived at the above calculations.**

2. If you feel that the AMA does not adequately assess the medical impairment of the Claimant, please express a whole body impairment that you think is appropriate for this patient. Please explain how you arrived at this percentage: ____ % whole body.

3. Considering the nature of Claimant's occupation, do you feel that his impairment will have occupational implications greater than the impairment assessed above: Yes Y No _____
   Briefly explain if desired.

G. FUNCTIONAL CAPACITY ASSESSMENT

LIMITED, BUT RETAINS MAXIMUM CAPACITIES TO:
Lift (including upward pulling) and/or CARRY:
[X] 10 lbs. [ ] 20 lbs. [ ] 50 lbs. or more

FREQUENTLY LIFT and/or CARRY:
[X] 10 lbs. [ ] 25 lbs. [ ] 50 lbs. or more

OCCASIONALLY LIFT and/or CARRY:
[X] LESS than 10 lbs. (e.g. files, ledgers, small tools, etc.)

STAND and/or WALK A TOTAL of:
[ ] LESS than ABOUT 3 hrs. (If marked limitation, explain)
[X] LESS than ABOUT 6 hrs. (If marked limitation, explain)
[ ] ABOUT 6 hrs. (per 8-hr. day)

SIT a TOTAL of:
[ ] LESS than ABOUT 3 hrs. (If marked limitation, explain)
[ ] LESS than ABOUT 5 hrs. (If marked limitation, explain)
[X] ABOUT 6 hrs. (Per 8-hr. day)

PUSH and/or PULL (Including hand/or foot controls):
[ ] UNLIMITED
[X] LIMITED (Describe degree of limitation)

PHYSICAL FACTORS:

	Frequently	Occasionally	Never		Unlimited	Limited
Climbing	[ ]	[X]	[ ]	Reaching	[ ]	[X]
Balancing	[ ]	[X]	[ ]	Handling	[ ]	[X]
Stooping	[ ]	[X]	[ ]	Fingering	[X]	[ ]
Kneeling	[ ]	[ ]	[X]	Feeling	[X]	[ ]
Crouching	[ ]	[ ]	[X]	Seeing	[X]	[ ]
Crawling	[ ]	[ ]	[X]	Hearing	[X]	[ ]
				Speaking	[X]	[ ]

Describe in what ways the impaired activities are limited:

Environmental Restriction (e.g. heights, machinery, temperature extremes, dust, fumes, humidity, vibration, etc.):

[X] None [ ] Yes (Describe below)

H. PHYSICIAN CERTIFICATION AND QUALIFICATIONS

I certify that the information furnished is correct and am aware that my signature attests to its accuracy. I further certify that all opinions are formulated within the realm of reasonable medical probability. I further certify that my statement of qualifications is attached and that it is accurate.

Signature: A Nawaby Darby Dated: 11/13/90

OPERATIVE REPORT

Patient Name: SEARCE, Kay
Room: OPT
#:
M.D.: Narasimha Reddy, M.D.

Date of Surgery: 9-13-90

PREOPERATIVE DIAGNOSIS:
Rule out medial meniscal tear.

POSTOPERATIVE DIAGNOSIS:
Chondromalicia, medial condyle of the femur grade III/V.

SURGICAL PROCEDURE:
Arthroscopy. Arthroscopic debridement of the medial condyle of the femur.

DESCRIPTION: After obtaining adequate general anesthesia, the arthroscope was introduced through the lateral joint line. The entire knee joint was visualized and found to be normal except for a grade IV/V chondromalacia of the medial condyle. Using a power shaver, this area was carefully debrided until we encountered relatively smooth cartilage. The knee was irrigated and the puncture wounds were closed.

The patient tolerated the procedure well and left the operating room in satisfactory condition.

NR/pw
D: 9-13-90
T: 9-19-90

NAME: A. Narasimha Reddy, M.D.

BIRTHDATE: January 19, 1944

MEDICAL SCHOOL: Gandhi Medical College, Hyderabad, India

YEAR OF GRADUATION: 1972

POST GRADUATE TRAINING:

1. Gandhi Hospital, Rotating Internship 1972-1973 Hyderabad, India
2. Senior House Officer in Surgery 1973-1974 Ulster Hospital, Belfast
3. Resident in General Surgery, 1974-1976 Beth Israel Medial Center, New York City, New York
4. Resident in Orthopedic Surgery 1976-1979 University Missouri, Affiliated Hospitals Kansas City, Missouri

PRACTICE:

1. Assistant Professor 1979-1980
   Division of Orthopedic Surgery, University of Missouri
   Kansas City, Missouri
2. Private practice 1980 . . . . . present Glasgow, Kentucky

MEMBER:

1. AMA
2. KMA
3. Diplomat American Board of Orthopedic Surgery
4. Rellan, American Academy of Orthopedic Surgery

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS

Claim No. 89-00667

MARY KAY SCEARCE - - - - - - - - *Plaintiff*

v.

FRUIT OF THE LOOM - - - - - - - - *Defendant*

DEFENDANT'S DEMAND OF RIGHT OF CROSS-EXAMINATION AND MOTION TO PRODUCE PHYSICIAN, AND OBJECTION TO ADMISSIBILITY OF MEDICAL REPORT

Plaintiff has filed a motion to submit the medical report of Dr. A. Narashima Reddy dated November 13, 1990, as direct testimony pursuant to KRS 342.033. Pursuant to that same statute, Defendant demands the right to cross-examine Dr. Reddy and demands that Plaintiff be required to produce Dr. Reddy for cross-examination at a reasonable time at the expense of Plaintiff as a prerequisite to the admissibility of Dr. Reddy's report. In addition, Defendant, pursuant to KRS 342.033, objects to the admissibility of said report and, pursuant to 803 KAR 25:011, Section 13(8), states the grounds for the objection herein. In the following portions of this pleading, we will first point out in Section I the reasons Defendant has an absolute right to cross-examine Dr. Reddy and why such an absolute right requires that Plaintiff be required to schedule and pay for the depositions which will provide the right of cross-examination to Defendant. Stated simply, unless the right of cross-examination is absolute and unless the burden of furnishing the opportunity to exercise the right is borne by Plaintiff, KRS 342.033 is unconstitutional as a denial of due process of law, an improper delegation of

legislative authority, and void for vagueness. After discussing the absolute right of Defendant to cross-examine Dr. Reddy, we will note with particularity the objections to his report in Section II below.

I.

DEFENDANT HAS AN ABSOLUTE RIGHT TO CROSS-EXAMINE DR. REDDY; THE BURDEN OF SCHEDULING AND PAYING FOR SUCH CROSS-EXAMINATION RESTS UPON THE PLAINTIFF.

A long line of Kentucky cases, including *Brooks* v. *Island Creek Coal Company*, Ky.App., 678 S.W.2d 791 (1984), hold that the Workers' Compensation Act should be interpreted in a manner which will render it constitutional rather than unconstitutional. Thus, if the constitutional guarantee of due process would require that before the medical report of Dr. Reddy may be considered as evidence the Defendant must be provided an absolute right to crossexamine Dr. Reddy at the expense of the Plaintiff, then the Act should be so interpreted and applied.

It is well established in Kentucky law that the right of cross-examination is a fundamental adjunct of due process and must be provided in administrative proceedings which are adversarial in nature. *Kaelin* v. *City of Louisville*, Ky., 643 S.W.2d 590 (1982). *Black Mountain Corporation* v. *Williams*, Ky., 193 S.W.2d 416 (1946), holds that evidence produced in workers' compensation proceedings must be in a form authorized by customary legal procedures. The appellate courts of other states as well have recognized that while the evidentiary rules in an administrative proceeding may be relaxed, they cannot be relaxed to a point of dispensing with the right of cross-examination which is fundamental in Anglo-Saxon law. *Employers Commercial Union Insurance Group* v. *Schoen*, Alaska, 519 P.2d 819 (1974). In fact, the United States Supreme Court has recognized that the right to cross-examine an adverse party in administrative proceedings is constitutionally protected. *Goldberg* v. *Kelly*. 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d

287 (1970). Likewise, the Supreme Court of Montana, in *Hert* v. *J. J. Newberry Company*, Mont., 587 P.2d 11 (1978), held that every party to a workers' compensation proceeding has an absolute right to crossexamine adverse witnesses as part of the due process requirements imposed in workers' compensation proceedings.

Given that there is an absolute right to cross-examine adverse witnesses in workers' compensation cases, the question which next arises in connection with medical reports such as that of Dr. Reddy is: who is to bear the responsibility of producing the witness (by scheduling the witness's deposition) and defraying the expenses incurred in providing the opportunity to cross-examine. Although it appears that there is no guiding authority responsive to this question in the jurisprudence of Kentucky, other states have had the opportunity to examine the question under similar circumstances and statutes, and have determined that the proponent of the medical report must make the author of the report available for cross-examination and must bear the expense of providing the opportunity of cross-examination to the adverse party. In *Hert* v. *J. J. Newberry Company, supra*, the Supreme Court of Montana stated:

> Thus, it is the duty of any party before the Workers' Compensation Court, whether he be worker, employer, or carrier, if that party intends to rely on the medical evidence in a written medical report, to present the medical person or expert who is the author of the same for cross-examination either by deposition or by testimony at the hearing. 587 P.2d at 13.

Likewise, the Court of Appeals of Oregon, in *Hanna* v. *McGrew Bros. Sawmill, Inc.*, Ore.App., 605 P.2d 724 (1980), states:

> The procedure of offering medical testimony through the medium of written reports does not alter the status of the witness when he is called for the purposes of cross-examination. He still remains the witness of the party offering the medical reports and that party is responsible for paying the fees and expenses inci-

> dent to his appearance as a witness for cross-examination. 605 P.2d at 728.

Again, the Rhode Island Supreme Court, in *Drake Bakeries, Inc.* v. *Butler*, R.I., 178 A.2d 295 (1962), states:

> The proceedings under the Workmen's Compensation Act are necessarily adverse in nature, and the parties are free to produce such evidence and testimony as they deem essential to the interest of their respective causes. The cost of producing such evidence or testimony properly falls on the producing party. 178 A.2d at 299.

The appellate courts of many other states have rendered similar decisions. However, in order to avoid unnecessarily lengthening this response, we will simply cite some of the appellate decisions of other states which recognize that it is the duty of the proponent of a medical report to produce the author of the report for cross-examination and to defray the expenses incurred in connection with such cross-examination. These cases include: *Commercial Union Companies* v. *Smallwood*, Alaska, 550 P.2d 1261 (1976) ; *Chavez* v. *Industrial Commission*, Ariz., 425 P.2d 864 (1967) ; *Doss* v. *American Ventures, Inc.* , La. , 224 So. 2d 470 (1969) ; *Chambers* v. *Bigelow-Liptak Corp.*, Ark., 344 S.W.2d 588 (1961); and *Natalizia* v. *Atlantic Tubing & Rubber* Co., R.I., 105 A.2d 190 (1954).

The fact that requiring the Plaintiff in the instant case to produce Dr. Reddy for cross-examination will cause the Plaintiff' to incur additional monetary expense has been held an insufficient basis to dispose of the requirement that the proponent of evidence produce the witness f or cross-examination. As stated by the Superior Court of New Jersey in *Paco* v. *American Leather Mfg. Co.*, N.J. Super., 516 A.2d 623 (1986):

> The high cost of producing medical testimony, although a heavy burden for the injured employee to bear in some instances, simply cannot justify the trammeling of fundamental rights in a contested formal proceeding.

In like manner, the Arizona Court of Appeals, in *Jones* v. *Industrial Commission*, Ariz.App., 401 P.2d 172 (1965), states:

> The party entitled to the right or "opportunity" for cross-examination should not be compelled to expend money or effort in obtaining that "opportunity".

We would note, further, that if KRS 342.033 were applied in such a manner as to allow the Workers' Compensation Board to adopt regulations which do not protect the absolute right of an adversary to cross-examine the proponent's witnesses at the expense of the proponent, then KRS 342.033 would violate the well-recognized prohibition against the delegation of legislative authority in the absence of standards or safeguards governing the exercise of such authority. See *Miller* v. *Covington Development Authority*, Ky., 539 S.W.2d 1 (1976), and *Butler* v. *United Cerebral Palsy of Northern Kentucky, Inc.*, Ky., 352 S.W.2d 203 (1961). KRS 342.033, on its face, contains absolutely no standards or safeguards to govern the Board in promulgating regulations concerning the use of written medical reports as direct testimony. Unless the safeguard of an absolute right of cross-examination at the proponent's expense is implied in the statute, it is violative of the rule recognized in *Miller* and *Butler* and is unconstitutionally vague. Once again, since a constitutional interpretation and application of statutes is favored, *Brooks*, *supra*, KRS 342.033 must be interpreted so as to protect the absolute right of cross-examination at the expense of the proponent.

II.

OBJECTIONS TO THE ADMISSIBILITY OF DR. REDDY'S MEDICAL REPORT.

In addition to demanding its right to cross-examine Dr. Reddy as set forth above, Defendant objects to the admissibility of said report on the following specific grounds pursuant to 803 KAR 25:011, Section 13(8):

A. Admission of Dr. Reddy's Medical Report amounts to allowing the proponent to introduce unsworn medical

testimony in violation of due process requirements and Board regulations. The regulations which permit a medical report to be filed do not require that the medical report be subscribed and sworn by the physician making the report, but simply require that the report be signed. Thus, in essence, the regulations which allow a medical report to be filed on Form 107 allow the introduction of unsworn medical testimony. Allowing the introduction of unsworn medical testimony is in conflict with 803 KAR 25:011 Section 16(l), which requires that the rules of evidence which apply generally in the Commonwealth of Kentucky shall apply in workers' compensation cases. CR 43.04(l) states the general rule and requires that testimony given in a civil proceeding be under oath.

To allow unsworn medical testimony in the form of the Form 107 report is thus in conflict with one of the most basic requirements of evidence law—that testimony be given under oath or affirmation in order for the testimony to be competent. Accordingly, the regulations which allow the introduction of unsworn medical testimony deprive those persons against whom such evidence is introduced of due process of law.

B. The Form 107 omits important issues from inquiry, most notably issues relevant to the apportionment of liability between the Employer and the Special Fund.

C. The Form 107 elicits inadmissible medical opinions from the witness. Question No. 3 of Section F of the Form 107 asks the medical witness to express an opinion as to whether the Plaintiff Is functional impairment will have an occupational implication greater than the functional impairment assessed. In essence, this section of the Form 107 asks the medical witness to express an opinion as to occupational disability. Kentucky's courts have held on numerous occasions that a medical examiner should evaluate the impairment of bodily function, and the evaluation of occupational disability is a legal or administrative task. As stated in Con*gleton Brothers, Inc.* v. *Farmer*, Ky., 399 S.W.2d 722 (1966):

> We consider it appropriate to repeat the admonition given in *Kilgore* v. *Goose Creek Coal Co.*, Ky., 392 S.W.2d 78, that, while a medical examiner should evaluate the impairment of bodily function, it is a legal or administrative task to evaluate occupational disability.

Kentucky's highest court has stated that the medical expert should confine his testimony to medical matters. As stated in *Griffith* v. *Blair*, Ky., 430 S.W.2d 377 (1968):

> We agree with appellee's contention that a medical expert may not usurp the function of the Board by giving testimony which, in the form of a medical opinion, expresses a legal conclusion.

The seminal case of Os*borne* v. *Johnson*, Ky., 432 S.W.2d 800 (1968), discusses the difference between functional impairment and occupational disability. Question No. 3 in Section F of the Form 107 clearly asks the medical witness to express an opinion as to occupational disability, thereby asking the medical witness to express an opinion upon matters concerning which the witness is not qualified as an expert.

Since the Form 107 elicits opinions which are violative of well-recognized evidentiary rules which apply in workers' compensation cases, we submit that the motion to submit the report of Dr. Reddy on said form should be overruled.

D. Under Section G of the Form 107 the witness is asked to assess the functional capacity of the Plaintiff. These questions are suggestive and do not allow the witness to express his or her own opinion. For example, there is no space provided in which the physician can indicate that the Plaintiff is able to lift 100 pounds or more. There is no space provided wherein the witness can, for example, express the opinion that the Plaintiff is able to lift 35 pounds or less.

The Form 107, rather than suggesting a list of responses from which the witness may choose, should simply solicit the witness's opinions.

E. In Question No. 2 of Section F of Form 107, it is suggested to the witness that the AMA Guidelines may not adequately assess the medical impairment of the Plaintiff. Rather than suggesting a response in this manner, the question should simply elicit the expert's opinion as to whether or not the AMA Guidelines adequately assess the medical impairment of the claimant. If the doctor does not feel that the AMA Guides adequately assess medical impairment in any particular case, the doctor should be asked to explain *why* the AMA Guides are not adequate.

F. Without waiving the foregoing objections, the Defendant further objects to the introduction of Dr. Reddy's 107 Report as said report also addresses Dr. Reddy's treatment of the Plaintiff for a non work related problem. Dr. Reddy's Form 107 Report refers to an arthroscopic surgery he performed on the Plaintiff's knee. obviously, some of the restrictions imposed by Dr. Reddy relate to that surgery. It is impossible to separate Dr. Reddy's opinion as to the Plaintiff's alleged work related injury and his opinion as to the Plaintiff's knee problem.

III.
MOTION TO PRODUCE PHYSICIAN
FOR CROSS-EXAMINATION

Comes now the Defendant, by counsel, and for its Motion for an Order from the Administrative Law Judge directing the Plaintiff to produce Dr. Reddy for cross-examination at the Plaintiff's expense, states as follows:

1. The Defendant moves the Administrative Law Judge for an order directing the Plaintiff to produce Dr. Reddy for cross-examination by the Defendant at the Plaintiff's expense, either by deposition or at the time of the hearing to be held in this case. In support of this motion, the Defendant incorporates herein by reference the authority cited herein in its. "Demand of Right of Cross-Examination and Objection to Admissibility of Medical Report," above.

WHEREFORE, Defendant prays that the Plaintiff Is motion to file the medical report of Dr. Reddy as direct

testimony be overruled or that, in the alternative, this Defendant's absolute right to cross-examine Dr. Reddy be recognized and that the Plaintiff be directed to arrange for the deposition of Dr. Reddy at the Plaintiff's expense, either by deposition or at the hearing, as a prerequisite to the consideration of Dr. Reddy's medical report as evidence.

Respectfully submitted this 28th day of November, 1990.

HARNED, ANDERSON & BACHERT
324 E. 10th Ave.
P. 0. Box 1270
Bowling Green, KY 42102-1270
Telephone: (502)782-3938

By: /s/ Joy D. Denton
Joy D. Denton

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing were this 28th day of November, 1990, placed in the U. S. Mail addressed to the following:

BUTLER, BUTLER & HUDSON
Mr. Morris Butler
202 W. Court St., P.O. Box 280
Greensburg, KY 42743

Hon. Thomas A. Dockter
Administrative Law Judge
P.O. Box 3167
Louisville, KY 40201-3167

Hon. Frederic J. Cowan, Jr.
Attorney General
State Capitol
Frankfort, KY 40601

/s/ Joy D. Denton
Joy D. Denton

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS

Claim No. 89-00667

MARY KAY SCEARCE - - - - - - - - *Plaintiff*

v.

FRUIT OF THE LOOM - - - - - - - - *Defendant*

ORDER

This matter coming before the Administrative Law Judge on the motion of the Plaintiff to file the 107 Report of Dr. Narashimha Reddy and the Administrative Law Judge being sufficiently advised:

IT IS HEREBY ORDERED that the Plaintiff's motion is SUSTAINED and the 107 Report of Dr. Narashimha Reddy is hereby admitted into evidence and shall be considered as evidence in this case to the same extent as if Dr. Reddy had personally appeared and testified as set forth in such report, subject to the Defendant's right of cross-examination.

THIS 4th day of December, 1990 .

/s/ Thomas A. Dockter
Judge, Thomas A. Dockter

Copies to:

Hon. Morris Butler
Attorney for Plaintiff
P.O. Box 280
Greensburg, KY 42743

Hon. Joy Denton
Attorney for Defendant
P.O. Box 1270
Bowling Green, KY 42102-1270

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS

Claim No. 89-00667

MARY KAY SCEARCE - - - - - - - - - *Plaintiff*

v.

FRUIT OF THE LOOM - - - - - - - - - *Defendant*

MOTION TO FILE MEDICAL REPORT

Comes the Plaintiff, Mary Kay Scearce, by counsel, and hereby moves the Board pursuant to KRS 342.033, and the Kentucky Workers Compensation Board of Rules of Procedure, 803 KAR 25:011, §13, to file as evidence the medical report of Dr. Kenneth J.S. DeSimone, dated November 12, 1990 attached hereto.

WHEREFORE, Plaintiff moves that the report of Dr. Kenneth J. S. DeSimone dated November 12, 1990, copy attached hereto, shall be filed in this proceeding and shall be considered as evidence in this case to the same extent as if Dr. DeSimone had personally appeared and testified as set forth in such report. Subject to the Defendant's right of cross-examination.

This 21st day of November, 1990.

BUTLER, BUTLER, & HUDSON
202 W. Court St., P.O. Box 280
Greensburg, KY 42743
Phone: (502) 932-4821
ATTORNEYS FOR PLAINTIFF

/s/ Morris Butler
Morris Butler

Original and copies forwarded this 21st day of November, 1990 to:

Workers' Compensation Board
Perimeter Park West
1262 Louisville Road, Bldg. C
Frankfort, KY 40601

Hon. Thomas A. Dockter
Administrative Law Judge
514 W. Liberty St., Room 139
Louisville, KY 40202

/s/ Morris Butler
Of Counsel for Plaintiff

Hon. Joy Denton
Attorney for Plaintiff
P.O. Box 1270
Bowling Green, KY 42101-1270

FORM 107
Adopted April 19, 1988
Medical Report
(Injury)

DEPARTMENT OF WORKERS' CLAIMS
WORKERS' COMPENSATION BOARD
FRANKFORT, KENTUCKY 40601

STANDARD FORM MEDICAL REPORT FOR INDUSTRIAL INJURIES

A. PATIENT INFORMATION (Please type or neatly print all responses)

1. Name and Address
Mary Kay Scearce
394 Blake Street
Columbia, KY 42728

2. Social Security Number: 407-70-5401
3. Date of Exam(s): 08-24-90
4. Date of Birth: 01-08-50

5. Treating Physician [x]
Evaluating Physician [x]

- Upon Whose Request: Morris Butler, Attorney at Law

- Date of Request: _____

B. PATIENT HISTORY

Include pertinent history of injury along with current treatment, hospitialization(s) and period(s) Claimant unable to work.

See attached.

C. PHYSICIAL EXAMINATION

Include chief complaints and state all findings relative to the industrial injury.

See attached.

D. SUMMARY OF DIAGNOSTIC TESTING

In the space below, check the applicable blocks next to any test results which you reviewed and relied upon to base your medical assessments or conclusions. Be sure to show the date of each test, and summarize results. Attach copy(s) of reports, if available.

		DATE	SUMMARY OF RESULTS
[X]	X-ray	Patient gives history of x-ray at Dr. Miles' office - Russell Springs, Ky. Dr. Kasdan's office Dr. Reddy's office - Glasgow	I do not have results or copies of these.
[X]	EMG	By history done in Dr. Garcia's office - Elizabethtown, Ky.	I do not have the results of these.
[X]	CT SCAN	Patient states she may have had this done in Louisville, Ky. probably at the request of Dr. Kasdan.	I do not have the results of this.
[ ]	MYELOGRAM	Not been done.	
[X]	MRI	Evidently from Louisville Imaging Company in Louisville, Ky. the patient is not sure of the date of this.	
[ ]	OTHERS		

E. SURGICAL PROCEDURES

Please specify (Attach Operative Note)

None by history have been performed.

F. **IMPAIRMENT**

1. Using the AMA's Physicians Guide to Evaluation of Permanent Impairment (1977 Edition), please translate the Claimant's condition to a percentage of whole body impairment:

_____ % whole body.

See attached medical report

NOTE: **Be sure to include all references to both Chapters 1 and 2 of the Guidelines. If Chapter 2 is not used, please specify why it is not appropriate in this evaluation.**

What tables did you use in arriving at this percentage?

Table 10 Page 56 Table _____ Page _____

Table _____ Page _____ Table _____ Page _____

Table _____ Page _____ Table _____ Page _____

NOTE: **Please explain specifically how you arrived at the above calculations.**

Enclosed.

2. If you feel that the AMA does not adequately assess the medical impairment of the Claimant, please express a whole body impairment that you think is appropriate for this patient. Please explain how you arrived at this percentage: _____ % whole body.

The AMA guidelines are not complete because her total percentage of disability is greater because of the Adson's test being positive and thoracic outlet compression syndrome being diagnosed on this patient at this time. This specific syndrome is not addressed in the guides for disability evaluations but the disability is discussed by Dr. Kleinert in his recent paper and copies of this will be included.

3. Considering the nature of Claimant's occupation, do you feel that his impairment will have occupational implications greater than the impairment assessed above: Yes X No _____
Briefly explain if desired.

See above desciption.

G. FUNCTIONAL CAPACITY ASSESSMENT

LIMITED, BUT RETAINS MAXIMUM CAPACITIES TO:
Lift: (including upward pulling) and/or CARRY:
[X] 10 lbs. [ ] 20 lbs. [ ] 50 lbs. or more Causes severe pain in the right arm.

FREQUENTLY LIFT and/or CARRY:
[ ] 10 lbs. [ ] 25 lbs. [ ] 50 lbs. or more Patient has pain in the right arm on motion and on lifting.

OCCASIONALLY LIFT and/or CARRY:
[ ] LESS than 10 lbs. (e.g. files, ledgers, small tools, etc.)

STAND and/or WALK A TOTAL of:
[ ] LESS than ABOUT 3 hrs. (If marked limitation, explain)
[X] LESS than ABOUT 6 hrs. (If marked limitation, explain)
[ ] ABOUT 6 hrs. (per 8-hr. day)

SIT a TOTAL of:
[X] LESS than ABOUT 3 hrs. (If marked limitation, explain) Causes increase in pressure and pain in
[ ] LESS than ABOUT 6 hrs. (If marked limitation, explain) the right arm.
[ ] ABOUT 6 hrs. (Per 8-hr. day)

PUSH and/or PULL (Including hand/or foot controls):
[ ] UNLIMITED
[X] LIMITED (Describe degree of limitation) Because of difficulty in manipulation of the right shoulder with thoracic outlet and reaching above her head.

PHYSICAL FACTORS:

	Frequently	Occasionally	Never		Unlimited	Limited
Climbing	[ ]	[X]	[ ]	Reaching	[ ]	[X] very.
Balancing	[ ]	[X]	[ ]	Handling	[ ]	[X]
Stooping	[ ]	[X]	[ ]	Fingering	[ ]	[X]
Kneeling	[ ]	[ ]	[X]	Feeling	[ ]	[X]
Crouching	[ ]	[ ]	[X]	Seeing	[X]	[ ]
Crawling	[ ]	[ ]	[X]	Hearing	[X]	[ ]
				Speaking	[X]	[ ]

Describe in what ways the impaired activities are limited:

There is pain in the arm, the raising of the arm above the head or turning the arm causes reduction of pulse with finger becoming numb, decrease in grip and referred pain into the hand and arm. The patient states she is unable to handle machinery because of numbness a pain in the right arm and shoulder.

Environmental Restriction (e.g. heights, machinery, temperature extremes, dust, fumes, humidity, vibration, etc.):

[ ] None [X] Yes (Describe below)

Cool atmosphere of air conditioning by history causes difficulty.

H. PHYSICIAN CERTIFICATION AND QUALIFICATIONS

I certify that the information furnished is correct and am aware that my signature attests to its accuracy. I further certify that all opinions are formulated within the realm of reasonable medical probability. I further certify that my statement of qualifications is attached and that it is accurate.

Signature: Kenneth J.S. DeSimone MD Dated: 11-12-90

Please type full name of physician: Kenneth J.S. DeSimone A-76

[LETTERHEAD OF KENNETH J. S. DeSIMONE, M.D., F.A.C.A. F.I.C.S.]

Ms. Mary K. Searce
394 Blake St.
Columbia, Kentucky 42728

SOCIAL SECURITY NUMBER: 407-70-0541

DATE OF EXAMINATION: 11-12-1990

UPON WHOSE REQUEST: Mr. Morris Butler

PERTINENT HISTORY: Ms. Mary K. Searce gives a prolonged history of over use syndrome of use of the right and left upper extremities. The patient has been seen by numerous physicians for work up on this and scans previously performed. However, the patient has severe pain, discomfort, tingling in the right extremity and extending into the right midfinger. The patient, on physical examination, has a positive Adson's test on the thoracic outlet syndrome. The patient does have a reduction of pulse during this test. The patient's medications have consisted of Voltaren 75 mg. one BID. However, patient does give a past history of pepetic ulcer disease and hiatus hernia.

PHYSICAL EXAMINATION: Reveals severe pain in the right shoulder, arm and right wrist. The patient has a tingling in the arm and Adson's test is positive for thoracic outlet compression. The patient has reduction in grip strength and reduction of reflexes of the biceps, triceps and osteogenic reflex of the right wrist. The patient also has the pain and cold sensation in the hands on digital palpation.

OTHER DIAGNOSTIC TEST: X-ray has been performed 1. Dr. Miles' office Russell Springs, Kentucky.

CLINICAL IMPRESSION: Guidelines thoracic outlet compression reveals a marked tightness to manipulation of the head to the right and to the left with elevation of the chin and head. The patient has tenderness at the thoracic outlet area, also the rotator cuff. The

pronator area is tender as well as the posterior interosseous compartment. There is mild tenderness over the carpal tunnel syndrome but no deQuervain's disease ganglion cyst or trigger finger is noted at this time. There is no carpal tunnel syndrome noted at this time but there is tenderness on the lateral epicondyle of the musculature at this time.

IMPAIRMENT RATING: Total to the body as a whole would be 38Z using guidelines in the AMA's Physician's Guide to Evaluate Permanent Impairment "77 edition and McBride's Guide Disability Evaluation and Principles of Treatment of Compensatible Injuries by Lippencot Company, machine operator division, seamstress.

/s/ Kenneth J.S. DeSimone, M.D.
Kenneth J.S. DeSimone, M.D., F.A.C.S.F.I.C.S.

[LETTERHEAD OF KENNETH J. S. DeSIMONE, M.D., F.A.C.A. F.I.C.S.]

QUALIFICATIONS

KENNETH J. S. DESIMONE, M. D.

University of Louisville B. A. Degree 1950

University of Louisville School of Medicine M. D. Degree 1954 Internship University of Louisville, Louisville General Hospital 1954-1955

Four years of General practice, Campbellsville, KY 1955-1959

Four years General-Surgical Residency at the University of Louisville 1959-1963 School of Medicine, University of Louisville Hospitals and affiliated hospitals in Chicago, Veterans and private hospitals in Louisville

Diplomat of the American Board of Surgery 11-29-65

Fellow of the American College of Surgeons

Fellow of the International College of Surgeons

Alpha-Epsilon-Delta Honorary Pre-Med

Alpha-Omega-Alpha Honorary Med

Licensed in Kentucky, Illinois and Arizona

Member of the Green County Medical Society

Member of the Kentucky Medical Association

Member of the American Medical Association

Department Surgeon American Legion, Department of Kentucky

Past consultant to the National Commander, American Legion

Southern Medical Association, Life Member

Past Chief of Surgery at Jane Todd Crawford Memorial Hospital

Present Medical Director West Lake Cumberland Hospital

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS

Claim No. 89-00667

MARY KAY SCEARCE - - - - - - - - *Plaintiff*

v.

FRUIT OF THE LOOM - - - - - - - - *Defendant*

DEFENDANT'S DEMAND OF RIGHT OF CROSS-EXAMINATION AND MOTION TO PRODUCE PHYSICIAN, AND OBJECTION TO ADMISSIBILITY OF MEDICAL REPORT

Plaintiff has filed a motion to submit the medical report of Dr. Kenneth J.S. DeSimone dated November 12, 1990, as direct testimony pursuant to KRS 342.033. Pursuant to that same statute, Defendant demands the right to cross-examine Dr. DeSimone and demands that Plaintiff be required to produce Dr. DeSimone for cross-examination at a reasonable time at the expense of Plaintiff as a prerequisite to the admissibility of Dr. DeSimone's report. In addition, Defendant, pursuant to KRS 342.033, objects to the admissibility of said report and, pursuant to 803 KAR 25:011, Section 13 (8) , states the grounds for the objection herein. In the following portions of this pleading, we will first point out in Section I the reasons Defendant has an absolute right to crossexamine Dr. DeSimone and why such an absolute right requires that Plaintiff be required to schedule and pay for the depositions which will provide the right of cross-examination to Defendant. Stated simply, unless the right of cross-examination is absolute and unless the burden of furnishing the opportunity to exercise the right is borne by Plaintiff, KRS 342.033 is

unconstitutional as a denial of due process of law, an improper delegation of legislative authority, and void for vagueness. After discussing the absolute right of Defendant to cross-examine Dr. DeSimone, we will note with particularity the objections to his report in Section II below.

I.

DEFENDANT HAS AN ABSOLUTE RIGHT TO CROSS-EXAMINE DR. DESIMONE; THE BURDEN OF SCHEDULING AND PAYING FOR SUCH CROSS-EXAMINATION RESTS UPON THE PLAINTIFF.

A long line of Kentucky cases, including *Brooks* v. *Island Creek Coal Company*, Ky.App., 678 S.W.2d 791 (1984), hold that the Workers' Compensation Act should be interpreted in a manner which will render it constitutional rather than unconstitutional. Thus, if the constitutional guarantee of due process would require that before the medical report of Dr. DeSimone may be considered as evidence the Defendant must be provided an absolute right to cross-examine Dr. DeSimone at the expense of the Plaintiff, then the Act should be so interpreted and applied.

It is well established in Kentucky law that the right of cross-examination is a fundamental adjunct of due process and must be provided in administrative proceedings which are adversarial in nature. *Kaelin* v. *City of Louisville*, Ky., 643 S.W.2d 590 (1982). *Black Mountain Corporation* v. *Williams*, Ky., 193 S.W. 2d 416 (1946), holds that evidence produced in workers' compensation proceedings must be in a form authorized by customary legal procedures. The appellate courts of other states as well have recognized that while the evidentiary rules in an administrative proceeding may be relaxed, they cannot be relaxed to a point of dispensing with the right of cross-examination which is fundamental in Anglo-Saxon law. *Employers Commercial Union Insurance Group* v. *Schoen*, Alaska, 519 P.2d 819 (1974). In fact, the United States Supreme Court has recognized that the right to cross-examine an adverse party

in administrative proceedings is constitutionally protected. *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Likewise, the Supreme Court of Montana, in *Hert* v. *J. J. Newberry Company*, Mont., 587 P.2d 11 (1978), held that every party to a workers' compensation proceeding has an absolute right to cross-examine adverse witnesses as part of the due process requirements imposed in workers' compensation proceedings.

Given that there is an absolute right to cross-examine adverse witnesses in workers' compensation cases, the question which next arises in connection with medical reports such as that of Dr. DeSimone is: who is to bear the responsibility of producing the witness (by scheduling the witness's deposition) and defraying the expenses incurred in providing the opportunity to cross-examine. Although it appears that there is no guiding authority responsive to this question in the jurisprudence of Kentucky, other states have had the opportunity to examine the question under similar circumstances and statutes, and have determined that the proponent of the medical report must make the author of the report available for cross-examination and must bear the expense of providing the opportunity of cross-examination to the adverse party. In *Hert* v. *J. J. Newberry Company, supra*, the Supreme Court of Montana stated:

> Thus, it is the duty of any party before the Workers' Compensation Court, whether he be worker, employer, or carrier, if that party intends to rely on the medical evidence in a written medical report, to present the medical person or expert who is the author of the same for cross-examination either by deposition or by testimony at the hearing. 587 P.2d at 13.

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> The procedure of offering medical testimony through the medium of written reports does not alter the status of the witness when he is called for the purposes of cross-examination. He still remains the witness of

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Again, the Rhode Island Supreme Court, in *Drake Bakeries, Inc.* v. *Butler*, R.I., 178 A.2d 295 (1962), states:

> The proceedings under the Workmen's Compensation Act are necessarily adverse in nature, and the parties are free to produce such evidence and testimony as they deem essential to the interest of their respective causes. The cost of producing such evidence or testimony properly falls on the producing party. 178 A.2d at 299.

The appellate courts of many other states have rendered similar decisions. However, in order to avoid unnecessarily lengthening this response, we will simply cite some of the appellate decisions of other states which recognize that it is the duty of the proponent of a medical report to produce the author of the report for cross-examination and to defray the expenses incurred in connection with such cross-examination. These cases include: *Commercial Union Companies* v. *Smallwood*, Alaska, 550 P.2d 1261 (1976) ; *Chavez* v. *Industrial Commission*, Ariz., 425 P.2d 864 (1967); *Doss* v. *American Ventures, Inc.*, La., 224 So.2d 470 (1969); *Chambers* v. *Bigelow-Liptak Corp.*, Ark., 344 S.W.2d 588 (1961); and *Natalizia* v. *Atlantic Tubing & Rubber* Co., R.I., 105 A.2d 190 (1954).

The fact that requiring the Plaintiff in the instant case to produce Dr. DeSimone for cross-examination will cause the Plaintiff to incur additional monetary expense has been held an insufficient basis to dispose of the requirement that the proponent of evidence produce the witness f or cross-examination. As stated by the Superior Court of New Jersey in *Paco* v. *American Leather Mfg. Co..*, N.J. Super., 516 A.2d 623 (1986):

> The high cost of producing medical testimony, although a heavy burden for the injured employee to bear in some instances, simply cannot justify the trammeling of fundamental rights in a contested formal proceeding.

In like manner, the Arizona Court of Appeals, in *Jones* v. *Industrial Commission*, Ariz.App., 401 P.2d 172 (1965), states:

> The party entitled to the right or "opportunity" for cross-examination should not be compelled to expend money or effort in obtaining that "opportunity".

We would note, further, that if KRS 342.033 were applied in such a manner as to allow the Workers' Compensation Board to adopt regulations which do not protect the absolute right of an adversary to cross-examine the proponent's witnesses at the expense of the proponent, then KRS 342.033 would violate the well-recognized prohibition against the delegation of legislative authority in the absence of standards or safeguards governing the exercise of such authority. See *Miller* v. *Covington Development Authority*, Ky., 539 S.W.2d 1 (1976), and *Butler* v. *United Cerebral Palsy of Northern Kentucky*, Inc., Ky., 352 S.W.2d 203 (1961). KRS 342.033, on its face, contains absolutely no standards or safeguards to govern the Board in promulgating regulations concerning the use of written medical reports as direct testimony. Unless the safeguard of an absolute right of cross-examination at the proponent's expense is implied in the statute, it is violative of the rule recognized in *Miller* and *Butler* and is unconstitutionally vague. once again, since a constitutional interpretation and application of statutes is favored, *Brooks, supra*, KRS 342.033 must be interpreted so as to protect the absolute right of cross-examination at the expense of the proponent.

II.

OBJECTIONS TO THE ADMISSIBILITY OF DR. DESIMONE'S MEDICAL REPORT.

In addition to demanding its right to cross-examine Dr. DeSimone as set forth above, Defendant objects to the admissibility of said report on the following specific grounds pursuant to 803 KAR 25:011, Section 13(8):

A. Admission of Dr. DeSimone's Medical Report amounts to allowing the proponent to introduce unsworn medical testimony in violation of due process requirements

and Board regulations. The regulations which permit a medical report to be filed do not require that the medical report be subscribed and sworn by the physician making the report, but simply require that the report be signed. Thus, in essence, the regulations which allow a medical report to be filed on Form 107 allow the introduction of unsworn medical testimony. Allowing the introduction of unsworn medical testimony is in conflict with 803 KAR 25:011 Section 16(1), which requires that the rules of evidence which apply generally in the Commonwealth of Kentucky shall apply in workers' compensation cases. CR 43.04(1) states the general rule and requires that testimony given in a civil proceeding be under oath.

To allow unsworn medical testimony in the form of the Form 107 report is thus in conflict with one of the most basic requirements of evidence law—that testimony be given under oath or affirmation in order for the testimony to be competent. Accordingly, the regulations which allow the introduction of unsworn medical testimony deprive those persons against whom such evidence is introduced of due process of law.

B. The Form 107 omits important issues from inquiry, most notably issues relevant to the apportionment of liability between the Employer and the Special Fund.

C. The Form 107 elicits inadmissible medical opinions from the witness. Question No. 3 of Section F of the Form 107 asks the medical witness to express an opinion as to whether the Plaintiff's functional impairment will have an occupational implication greater than the functional impairment assessed. In essence, this section of the Form 107 asks the medical witness to express an opinion as to occupational disability. Kentucky's courts have held on numerous occasions that a medical examiner should evaluate the impairment of bodily function, and the evaluation of occupational disability is a legal or administrative task. As stated in *Congleton Brothers, Inc.* v. *Farmer*, Ky., 399 S.W.2d 722 (1966):

> We consider it appropriate to repeat the admonition given in *Kilgore* v. *Goose Creek Coal Co.*, Ky., 392 S.W.2d 78, that, while a medical examiner should evaluate the impairment of bodily function, it is a legal or administrative task to evaluate occupational disability.

Kentucky's highest court has stated that the medical expert should confine his testimony to medical matters. As stated in *Griffith* v. *Blair*, Ky., 430 S.W.2d 377 (1968):

> We agree with appellee's contention that a medical expert may not usurp the function of the Board by giving testimony which, in the form of a medical opinion, expresses a legal conclusion.

The seminal case of *Osborne* v. *Johnson*, Ky., 432 S.W. 2d 800 (1968) , discusses the difference between functional impairment and occupational disability. Question No. 3 in Section F of the Form 107 clearly asks the medical witness to express an opinion as to occupational disability, thereby asking the medical witness to express an opinion upon matters concerning which the witness is not qualified as an expert.

Since the Form 107 elicits opinions which are violative of well-recognized evidentiary rules which apply in workers' compensation cases, we submit that the motion to submit the report of Dr. DeSimone on said form should be overruled.

D. Under Section G of the Form 107 the witness is asked to assess the functional capacity of the Plaintiff. These questions are suggestive and do not allow the witness to express his or her own opinion. For example, there is no space provided in which the physician can indicate that the Plaintiff is able to lift 100 pounds or more. There is no space provided wherein the witness can, for example, express the opinion that the Plaintiff is able to lift 35 pounds or less.

The Form 107, rather than suggesting a list of responses from which the witness may choose, should simply solicit the witness's opinions.

E. In Question No. 2 of Section F of Form 107, it is suggested to the witness that the AMA Guidelines may not adequately assess the medical impairment of the Plaintiff. Rather than suggesting a response in this manner, the question should simply elicit the expert's opinion as to whether or not the AMA Guidelines adequately assess the medical impairment of the claimant. If the doctor does not feel that the AMA Guides adequately assess medical impairment in any particular case, the doctor should be asked to explain *why* the AMA Guides are not adequate.

III.

MOTION TO PRODUCE PHYSICIAN FOR CROSS-EXAMINATION

Comes now the Defendant, by counsel, and for its Motion for an Order from the Administrative Law Judge directing the Plaintiff to produce Dr. DeSimone for cross-examination at the Plaintiff Is expense, states as follows:

1. The Defendant moves the Administrative Law Judge for an Order directing the Plaintiff to produce Dr. DeSimone for cross-examination by the Defendant at the Plaintiff's expense either by deposition or at the time of the hearing to be held in this case. In support of this motion, the Defendant incorporates herein by reference the authority cited herein in its "Demand of Right of Cross-Examination and Objection to Admissibility of Medical Report," above.

WHEREFORE, Defendant prays that the Plaintiff Is motion to file the medical report of Dr. DeSimone as direct testimony be overruled or that, in the alternative, this Defendant's absolute right to cross-examine Dr. DeSimone be recognized and that the Plaintiff be directed to arrange for the deposition of Dr. DeSimone at the Plaintiff's expense, either by deposition or at the hearing, as a prerequisite to the consideration of Dr. DeSimone's medical report as evidence.

Respectfully submitted this 28th day of November, 1990.

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Telephone: (502)782-3938

By: /s/ Joy D. Denton
Joy D. Denton

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing were this 28th day of November, 1990, placed in the U. S. Mail addressed to-the following:

Hon. Frederic J. Cowan, Jr.
Attorney General
State Capitol
Frankfort, KY 40601

BUTLER, BUTLER & HUDSON
P.O. Box 280
Greensburg, KY 42743

Hon. Thomas A. Dockter
P.O. Box 3167
Louisville, KY 40201-3167

/s/ Joy D. Denton
Joy D. Denton

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS

Claim No. 89-00667

MARY KAY SCEARCE - - - - - - - - *Plaintiff*

v.

FRUIT OF THE LOOM - - - - - - - - *Defendant*

ORDER

This matter coming before the Administrative Law Judge on the motion of the Plaintiff to file the 107 Report of Dr. Kenneth J.S. DeSimone and the Administrative Law Judge being sufficiently advised:

IT IS HEREBY ORDERED that the Plaintiff's motion is SUSTAINED and the 107 Report of Dr. Kenneth J.S. DeSimone is hereby admitted into evidence and shall be considered as evidence in this case to the same extent as if Dr. DeSimone had personally appeared and testified as set forth in such report, subject to the Defendant's right of cross examination.

THIS 6th day of December, 1990.

/s/ Thomas A. Dockter
Judge, Thomas A. Dockter

Copies to:
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Greensburg, KY. 42743

Hon. Joy Denton
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Bowling Green, KY 42102-1270

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS

Claim No. 89-00667

MARY KAY SCEARCE - - - - - - - - - *Plaintiff*

v.

FRUIT OF THE LOOM and
SPECIAL FUND - - - - - - - - - - *Defendant*

PREHEARING ORDER AND MEMORANDUM

I. STIPULATIONS

1. Coverage under the Act.
2. An employment relationship existed between the plaintiff and defendant-employer at all times herein relevant.
3. Plaintiff allegedly sustained work-related injur(ies) on 2/22/88.
4. The defendant-employer had due and timely notice of plaintiff's alleged injur(ies).
5. Temporary total disability benefits were paid at the rate of $281.60 per week from 11/29/88 through 6/12/90, for a total of $17,620.64.
6. The defendant-employer has paid on behalf of plaintiff medical expenses in the amount of $5,692.78.
7. Plaintiff's average weekly wage was $————.
8. Date(s) plaintiff returned to work: Various periods to be discussed at Hearings.
9. Plaintiff's Date of Birth: 1/8/50.
10. Plaintiff's educational level: 8th Grade.
11. Plaintiff's specialized or vocational training: None.

II. CONTESTED ISSUES

[Only the following issues shall be subject to further proceedings pursuant to 803 KAR 25:011 S8(6)].

A.W.W.; Extent & duration; Causation

III. HEARING

A hearing in the above-styled claim is hereby scheduled on February 7, 1991, at 1:00 pm o'clock at Warren County Courthouse, Bowling Green, Ky.

This date is within the time limits set forth in KRS 342.275 unless waived by the parties.

IV. OTHER MATTERS

Oral motion to dismiss Special Fund is Sustained.

This 14th day of January, 1991.

/s/ Thomas A. Dockter
Administrative Law Judge

Have seen and agreed to:

/s/ Illegible
Attorney for Plaintiff

/s/ Joy D. Denton
Attorney for Defendant-employer

/s/ Illegible
Attorney for Special Fund

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS

Claim No. 89-00667

MARY KAY SCEARCE - - - - - - - - - *Plaintiff*

v.

FRUIT OF THE LOOM - - - - - - - - - *Defendant*

BRIEF ON BEHALF OF DEFENDANT, FRUIT OF THE LOOM

INTRODUCTION

The Plaintiff, Mary Kay Scearce, seeks a permanent disability award as a result of an injury allegedly sustained while working for the Defendant, Fruit of the Loom.

The Plaintiff alleges that she is totally occupationally disabled. However, it is the position of this Defendant, that the Plaintiff has not established any connection between the Plaintiff's alleged injury and her work at Fruit of the Loom. Secondly, the proof establishes that the Plaintiff has not sustained an injury of appreciable proportions.

Stipulations were entered into by the parties at the prehearing conference. It should be noted that it was stipulated that the Defendant received notice of an a*lleged* work-related injury, but it was not stipulated that the Plaintiff's current problems, if any, are the result of her work at Fruit of the Loom.

ARGUMENT

I.

THE PLAINTIFF HAS FAILED TO ESTABLISH CAUSATION

The Plaintiff, in her Brief, makes no attempt to distinguish the causation issue from the issue of extent and

duration. As such, it is somewhat difficult to respond to the Plaintiff's Brief. However, the Defendant would point out that even if one is to assume the validity of Plaintiff's argument that an injury of appreciable proportions need not be shown (which the Def endant does not accept as a correct statement of the applicable law) the Plaintiff must still establish causation within reasonable medical probability.

It is well established that the burden of proof lies on the Plaintiff to prove the necessary elements in order to establish a prima facie case under the Workers' Compensation Statute. *Snawder* v. *Stice*, Ky. App., 576 S.W. 2d 276 (1979); *Kentland-Elkhorn Coal Co.* v. *Johnson*, Ky.App., 549 S.W.2d 308 (1977); and *Young* v. *Burgett*, Ky. 483 S.W.2d 450 (1972). In the present case, the Plaintiff has failed to meet her burden of proof as to the work-relatedness of her present problems, if any. Within the work-relatedness or causation element, there are two factors: First, the injury must have arisen out of and in the course of employment or have been work-related. *Jackson* v. *Cowden Manufacturing Co.*, Ky.App. 578 S.W.2d 259 (1978); and second, the resulting condition for which compensation is sought must have been caused by the injuring event. *Markwell & Hartz, Inc.* v. *Pigman*, Ky., 473 S.W.2d 842 (1971). These requirements are encompassed within the statutory definition of "injury" which is defined to mean "any work-related harmful change in the human organism, arising out of and in the course of employment . . ." KRS 342.620 (1) Furthermore, these elements must be established within reasonable medical probability. *Markwell & Hartz, Inc.* v. *Pigman, supra; Young* v. *L.A. Davidson, Inc.*, Ky., 463 S.W.2d 924 (1971). The Plaintiff has failed to prove that her present problems, if any, are a result of her work at Fruit of the Loom.

The Plaintiff is 41 years old and worked as a sewing machine operator at Fruit of the Loom. She alleges that her problems initially began in February of 1986 when her right shoulder and neck started hurting. Eventually this

pain moved into her right wrist. However, Ms. Scearce continued working at her regular job as a sewing machine operator. (Scearce depo. p. 12, 14, and 15.) According to Ms. Scearce, the pain in her right shoulder and wrist continued. In approximately 1988, she began having the same pain in her left neck, shoulder, and wrist (Scearce depo. p. 16, 18.) At the present time, Ms. Scearce complains of numbness and alleges that the pain grows worse all the time. According to Ms. Scearce the pain has gotten no better since she last worked at Fruit of the Loom in September, 1989. In Ms. Scearce's own words, "it's just affecting me more every day." 11 (T.H., page 12.)

Ms. Scearce started seeing Dr. Phil Aaron on February 22, 1988. Ms. Scearce presents Dr. Aaron's medical proof by way of the Form 107 he completed at the request of her attorney. Dr. Aaron's testimony is defective in two ways. First, the information contained in the Form 107 does not by itself establish causation, which is a vital element in the Plaintiff Is case. Second, the Defendant objects to the use of the Form 107 as direct testimony as it denies the right to cross-examination of witnesses.

The Plaintiff's use of the Form 107 as her sole medical proof does not establish causation. There is no question in the document which inquires as to causation, and it is well settled that the possibility of causal connection is not enough to prove such connection as a fact. *Markwell & Hartz, Inc.* v. *Pigman, supra; Kelly Contracting Company* v. *Robinson,* Ky., 377 S.W.2d 892, 894 (1964). Dr. Aaron states that the Plaintiff's problems with her neck, shoulders, arms, and wrists create a 27% whole body impairment but he does not specifically state to what he attributes the impairment. (Aaron Form 107) The fact is that a properly founded hypothetical question is necessary to establish causation within reasonable medical probability. *Markwell, supra* at 846. The simple fact is that the Form 107 is non-dispositive as to causation as there is no opinion contained therein that the Plaintiff's current condition is related to her work at Fruit of the Loom within reasonable medical probability.

The Defendant renews its objection to the Plaintiff's use of the Form 107 in her direct testimony. Such use of the Form 107 denies the Defendant of its right to cross-examine the maker of such report. KRS 342.033. Defendant's objection to the admissability of the Form 107 as direct testimony, previously filed of record, is hereby incorporated by reference into this brief as it is set out in full.

The Plaintiff's only other medical testimony likewise comes in the form of a 107 of Dr. Narashima Reddy and Dr. Kenneth DeSimone. The Defendant's prior objection and argument as to the use and validity of the Form 107 as testimony are incorporated herein and applied to Dr. DeSimone and Dr. Reddy's Form 107 as if set out in full.

Again, pointing to the inadequacies of the 107 reports, Drs. Reddy, DeSimone and Aaron do indicate that there are certain restrictions and limitations imposed on the Plaintiff. However, no where does it indicate in these 107 Reports that these restrictions and limitations are imposed as a result of any injury sustained at Fruit of the Loom. Dr. Reddy's 107 Report is particularly true on this point. A review of Dr. Reddy's 107 Report reveals Dr. Reddy performed arthroscopic surgery on the Plaintiff's knee in September, 1990. Medical documentation attached to Dr. Reddy's report pertains to that arthroscopic surgery. Although there is no claim for a work related knee injury, Dr. Reddy precedes to assess restrictions which include occasionally climbing, balancing and stooping which is clearly related to the Plaintiff's knee problem. In addition, Dr. Reddy assesses certain limitations as to lifting. The question becomes, are these restrictions and limitations a result of Ms. Scearce's knee problem or her alleged work related injury? obviously, Dr. Reddy's 107 Report is entitled to no weight as it cannot be distinguished as to what condition, Ms. Scearce I s knee or her alleged work related injury, Dr. Reddy is addressing in his 107 Report.

Although Dr. Kenneth DeSimone assesses a 38% impairment rating, he bases this finding upon the AMA guides

and the McBride's Guide to Disability, Evaluation and Principles of Treatment of Compensable Injuries. Contrary to the assertions in the Plaintiff's Brief, Dr. DeSimone does *not* opine that Ms. Scearce is totally disabled. (Brief for Plaintiff, p. 3) It should be noted, that Dr. DeSimone specifically states that Ms. Scearce does not have carpal tunnel syndrome. However, Dr. DeSimone does diagnose thoracic outlet syndrome based upon a positive Addison's test. However, as Dr. O'Keefe explained in his deposition, the Addison's test is a "terrible test" in order to diagnose thoracic outlet syndrome. Furthermore, there is absolutely no objective evidence to indicate that Ms. Scearce has thoracic outlet syndrome. According to Dr. O'Keefe, the Addison's test is not sufficient by itself to diagnose thoracic outlet syndrome. There must be other objective findings (O'Keefe Depo., p. 11). As Dr. O'Keefe explained, thoracic outlet syndrome is an exceedingly rare condition and is not work related except in some rare people such as professional baseball pitchers. It is exceedingly rare and it is not considered to be work related in persons of the normal population. (O'Keefe Depo., p. 18). Dr. Morton Kasdan also agreed that simply because Dr. DeSimone had tested Ms. Scearce and had a positive Addison's test that she could possibly have thoracic outlet syndrome. (Kasdan Depo., p. 11). It is interesting to note that Dr. DeSimone's 107 Report indicates that Ms. Scearce has had an EMG, a CT scan, an MRI, and x-rays taken by three separate doctors. However, Dr. DeSimone did not have the results or copies of the results of any of these tests. His diagnosis was based purely upon his physical examination and the performance of the Addison's test. Furthermore, Dr. Aaron's 107 Report indicates that he did not have copies of the EMG results, the CT scan results, the MRI results or the x-rays taken by Dr. Miles, Dr. Kasdan, and Dr. Reddy. (107 Report of Dr. Aaron).

The Defendant, in contrast, has submitted medical proof from qualified Board certified physicians. The Defendant offers the testimony of Dr. Morton Kasdan. Dr. Kasdan is one of the foremost hand doctors and surgeons in the state

of Kentucky and is nationally and internationally known for his work. (Summitt depo. p. 20.) Dr. Kasdan saw Ms. Scearce on March 16, 1989, on the referral of Dr. Richard Miles. Dr. Kasdan diagnosed cumulative fatigue disorder and indicated that surgery is contraindicated. Dr. Kasdan assessed no impairment rating and testified that there is no physical impairment that would prevent Ms. Scearce from operating a sewing machine at Fruit of the Loom. Furthermore, it was the testimony of Dr. Kasdan that the fact that Ms. Scearce has been off work since Labor Day, 1989, and that she has continued to have problems with her right arm, wrist, and shoulder, and in her left wrist and in fact has not improved since she stopped working at Fruit of the Loom lends credence to the fact that her problems are not work-related as a cumulative trauma disorder will get better with rest. (Kasdan depo. p. 9).

Dr. Dennis O'Keefe, a Board-certified neurologist, saw Ms. Scearce on October 29, 1990. It was Dr. O'Keefe's testimony that there is no abnormality which would prevent Ms. Scearce from returning to work at a sewing machine factory. Specifically, Dr. O'Keefe testified that Ms. Scearce's history is not consistent with a work-related injury since she has been off work since September 6, 1989, and has had continued complaints of pain with no improvement. (O'Keefe depo. p. 5, 9.)

In addition, the Defendant has submitted the 107 report of Dr. Stanley Collis. Dr. Collis examined Ms. Scearce on June 12, 1990. Dr. Collis was of the opinion that Ms. Scearce has no acute disabling problem and no neurological deficit. She had an entirely normal examination. Dr. Collis suggested that Ms. Scearce return to work and specifically opined that she has no work-related problem. (Collis 107 Report.)

Thus, the Plaintiff has failed to establish causation within reasonable medical probability. Furthermore, the Defendant has shown through persuasive testimony that the Plaintiff Is present problems, if any, are not the result of her work at Fruit of the Loom.

II.

PLAINTIFF DID NOT SUSTAIN AN INJURY OF APPRECIABLE PROPORTIONS

In the alternative, should the Administrative Law Judge determine that the Plaintiff did sustain a work-related injury, the Defendant submits that the Plaintiff did not sustain an injury of appreciable proportions. It is well established in Kentucky that an award of permanent occupational disability benefits cannot be granted unless the Plaintiff has sustained a permanent injury of appreciable proportions. *Cook* v. *Paducah Recapping Service, supra; Osborne* v. *Johnson, supra.* In the present case, the preponderance of the credible and probative testimony establishes that the Plaintiff has not sustained an injury of appreciable proportions, and, consequently cannot be totally disabled as alleged by the Plaintiff.

As if acknowledging the fact that causation has not been proven, the Plaintiff cites several cases as an attempt to show that an injury of appreciable proportion need not be shown. The Plaintiff misunderstands the cases cited as they are simply not applicable to the facts or law at hand.

The Plaintiff cites *Blair* v. *General Electric* Co., Ky., 565 S.W.2d 631 (1978) as stating that a showing of an injury of appreciable proportion is no longer necessary. (Brief for Plaintiff, page 5.) The Plaintiff then cites *Jones* v. *Institute of Electronic Technology*, Ky., 613 S.W.2d 420 (1981) as stating again that the quotation of appreciable proportions in *Osborne* v. *Johnson* is not necessary and applicable. (Brief for Plaintiff, Page 5-6.) These cases are inapplicable to the facts at hand. The *Blair* and *Jones* cases pertain to "schedule" injuries, and were decided based upon statutory law which is no longer in existence. The scheduled scheme of compensation was abandoned when KRS 342.730 was amended in 1980. The old statute provided set benefit amounts for specific injuries such as loss of limb or an eye. If you sustained an injury as specified in the statute, your benefits were set by the statute. As such, there was no need for a finding of a loss of earning capac-

ity. See old KRS 342.730. With this knowledge, the quoted portions of Blair in the Plaintiff's brief can be put into proper context. After all, when injuries were compensated pursuant to a schedule, there may have been times when there was no need to show a loss of earning capacity. *Cook* v. *Paducah Recapping Service*, Ky., 694 S.W.2d 684 (1985). This simply is not the present state of the law. Under the present law, it is clear that an injury of appreciable proportions is required in order to justify an award of compensation. *Cook* v. *Paducah Recapping Service, supra*, (decided subsequent to Blair and *Jones)* .

The Plaintiff then proceeds to cite *Osborne* v. *Johnson*, Ky., 432 S.W.2d 800 for the proper test for occupational disability. However, the Plaintiff again promptly attempts to distort the applicable law with reference to an inapplicable case. *Gunderson* v. *City of Ashland*, Ky., 701 S.W.2d 135, cited in the Plaintiff's brief involved a former police officer who was confined to a wheelchair as a result of being shot in the line of duty. The Kentucky Supreme Court reinstated the Board's original holding of 100 percent occupational disability even though he continued to be employed as a switchboard dispatcher by the Police Department. *Id at* 136. The Court reasoned that but for the compassion of the Police Department, the man would be entirely precluded from competition in the job market. Apparently, the Plaintiff intends to cite this case to demonstrate that although she is not badly disabled, and although she can definitely hold down a job, she should nonetheless be held totally disabled. The *Gunderson* case does not stand for proposition.

The Plaintiff then cites *Johnson* v. *Skilton Construction Company*, Ky., 467 S.W.2d 785, 788 (1971). This case says basically that a claimant may give factual testimony from which conclusions *may* be drawn by the fact finder. However, the Respondent would point out that the *Johnson* case does not *require* such, and certainly does not require the Administrative Law Judge to ignore the credible medical testimony contained in the record.

The Defendant, on the other hand, has submitted competent medical proof that the Plaintiff did not sustain an injury of appreciable proportions. Dr. Morton Kasdan, upon examination, found full range of motion of Ms. Scearce's shoulders, elbows, wrist, and neck. There was no wasting of any muscle. Furthermore, the Tinel's test was negative, the Allen test was negative, and there were no bruits. Although Dr. Kasdan diagnosed cumulative fatigue disorder, he specifically testified that surgery is contraindicated for this lady. Dr. Kasdan assessed no impairment rating based upon the AMA Guides. Furthermore, it was Dr. Kasdan's opinion that there is no physical impairment which would prevent Ms. Scearce from operating a sewing machine at Fruit of the Loom. (Kasdan depo. p. 5-8.)

Dr. Dennis O'Keefe also found normal range of motion in the Plaintiff's shoulders, elbows, wrists, and neck upon examination. Dr. Kasdan found no bruits and there was normal bulk strength of all Ms. Scearce's major and minor groups of both upper extremities. The nerve conduction test performed by Dr. O'Keefe of the right upper extremities was within normal limits. According to Dr. O'Keefe there was no electrodiagnostic evidence of carpal tunnel syndrome. Further, Dr. O'Keefe specifically testified that Ms. Scearce had a normal general medical and neurologic examination. There is no impairment involving the neck, shoulders, or upper extremities. Furthermore, according to Dr. O'Keefe, there were no limitations or restrictions and no abnormalities which would prevent Ms. Scearce from returning to work at a sewing machine factory. (O'Keefe depo. p. 5.)

Dr. Stanley Collis' 107 report revealed that his examination of the neck showed normal curvature with no listing or muscle spasm or particular tenderness. Ms. Scearce's range of motion was good although at times she did make jumpy type movements. Furthermore, the examination of her right shoulder was normal. Dr. Collis's examination of both wrists and hands revealed normal configuration. Range of motion was normal in both wrists and she had a

good grip in both hands. Dr. Collis found no acute or disabling problem and no neurological deficit. In fact, his examination was entirely normal. Dr. Collis indicated that it was his opinion that Ms. Scearce could do any activities that an average female of the same age and size is expected to do. Furthermore, Dr. Collis recommended that Ms. Scearce return to normal activities and resume working. (Collis 107.)

The Defendant also offers the testimony of Dr. William Summitt, a rehabilitation counselor and vocational expert. Excluding the issue of causation, Dr. Summitt ultimately concluded from the testimony of Dr. Collis, Dr. Kasdan, and Dr. O'Keefe that the Plaintiff has a 0% vocational loss as a result of her present condition. Including the 107 Reports of Dr. Reddy, Dr. DeSimone, Dr. Aaron, the medical evidence submitted on behalf of the Plaintiff, Dr. Summitt initially assessed an 11.23% vocational loss. However, at the time of Dr. Summitt's evaluation, he did not have a transcript of Dr. Kasdan's deposition. Initially, Dr. Summitt testified that he assumed that Dr. Kasdan would restrict Ms. Scearce from returning to work as a sewing machine operator. However, Dr. Kasdan specifically testified that Ms. Scearce can return to her work at Fruit of the Loom. Therefore, accepting the medical proof most favorable to the Plaintiff, Ms. Scearce's vocational loss would be substantially less than 11.23% vocational loss according to Dr. Summitt. (Summitt Depo., p. 17-20).

Obviously, the Plaintiff is not totally occupationally disabled as she alleges. There is no evidence that Ms. Scearce is totally occupationally disabled because there is no evidence that she even sustained an injury of appreciable proportions. The medical proof submitted by the Plaintiff is not of substantive quality. on the other hand, the probative and credible testimony of Dr. Morton Kasdan, Dr. Dennis O'Keefe and Dr. Stanley Collis establishes that the Plaintiff has sustained no permanency and is in fact able to return to work. The only conclusion is that the Plaintiff has not sustained an injury of appreciable propor-

tions and the Plaintiff's claim for disability should accordingly be dismissed.

CONCLUSION

For the reasons set forth above, we submit that the Plaintiff has not established that her current medical condition was caused by her employment at Fruit of the Loom. Further, the absence of objective physical findings substantiate that the Plaintiff has not sustained an injury of appreciable proportions. Dr. O'Keefe did not assess any medical impairment rating. Dr. Kasdan did not assess any medical impairment rating. Dr. Collis did not assess any medical impairment rating. Nor did any of these doctors place any restrictions or limitations on the Plaintiff. In addition, Dr. William Summitt testified that the Plaintiff has an insignificant real loss of job opportunities as a result of her alleged injuries. Therefore, the Plaintiff's claim should be dismissed.

This 26th day of March, 1991.

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JOY D. DENTON

CERTIFICATION:

This is to certify that a true and correct copy of the foregoing was this ____ day of March, 1991 placed in the U.S. Mail addressed to the following:

Hon. Morris Butler
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Hon. Thomas A. Dockter
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Louisville, KY 40201-3167

Hon. Frederic J. Cowan, Jr.
Attorney General
State Capitol
Frankfort, KY 40601

_____

JOY D. DENTON

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS

Claim No. 89-0066

UNION UNDERWEAR COMPANY, INC. d/b/a FRUIT OF THE LOOM (INCORRECTLY NAMED FRUIT OF THE LOOM, INC.) - - - - - - - - - *Petitioner*

v.

MARY KAY SCEARCE and THOMAS A. DOCKTER, Administrative Law Judge - - - - - - - - - - - *Respondents*

BRIEF FOR PETITIONER, UNION UNDERWEAR COMPANY, INC. d/b/a FRUIT OF THE LOOM (INCORRECTLY NAMED FRUIT OF THE LOOM, INC.)

This the 29th day of April, 1992.

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/s/ Joy D. Denton
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INTRODUCTION

This Petitioner appeals the Opinion, Award and Order of Hon. Thomas A. Dockter, Administrative Law Judge, rendered January 7, 1992, and the Order dated March 17, 1992, overruling the Petitioner's Motion for Reconsideration and the Amended Order dated March 25, 1992, overruling the Petitioner's Motion for Reconsideration. The Administrative Law Judge found the Respondent, Mary Kay Scearce, to be 50% occupationally disabled. There is no evidence to support the Administrative Law Judge's finding that the Respondent sustained a work related injury. As such, the Petitioner contends that the Administrative Law Judge's Opinion, Award and Order should be overturned and the Respondent's case dismissed.

The Petitioner also objects to the admissibility of the Form 107 reports of Dr. Kenneth DeSimone, Dr. Phil Aaron, and Dr. Narasimha Reddy as direct testimony by the Respondent, Mary Kay Scearce.

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COUNTERSTATEMENT OF THE CASE

This case involves a forty one year old claimant who worked as a sewing machine operator at Fruit of the Loom. The Respondent alleges that she initially began to have problems in her right shoulder and neck in February, 1986. According to the Respondent, this pain eventually moved into her right wrist. However, the Respondent continued working at her regular job as a sewing machine operator. (Scearce Depo., p. 12, 14, and 15). In approximately 1988 the Respondent began to have the same pain in her left neck, shoulder and wrist. (Scearce Depo., p. 16, 18). The Respondent further alleges that at the present time she continues to have numbness and the pain grows worse all of the time. According to the Respondent, the pain she experiences has gotten no better since she last worked at Fruit of the Loom in September, 1989. (Transcript of Hearing, p. 12) (hereinafter "T.H"].

There is no evidence of record to support a finding that the Plaintiff's problems, if any, are work related. Therefore, the Administrative Law Judge's Opinion, Award and order should be overturned and the Respondent's claim for disability should be dismissed.

ARGUMENT

THERE IS NO EVIDENCE OF RECORD TO SUPPORT THE FINDING OF THE ADMINISTRATIVE LAW JUDGE THAT THE RESPONDENT SUSTAINED A WORK RELATED INJURY.

There is no evidence of record to support the Administrative Law Judge's determination that the Respondent has suffered a work related injury. It is well established that the burden of proof lies on the Plaintiff to prove the necessary elements in order to establish a prima facie case under the Workers' Compensation Act. *Snawder* v. *Stice,* Ky.App., 576 S.W. 2d 276 (1979); *Kentland-Elkhorn Coal Co.* v. *Johnson,* Ky.App., 549 S.W.2d 308 (1977) ; *Young* v. *Burgett,* Ky., 483 S.W.2d 450 (1972). In the present case, the Respondent has failed to meet her burden of proof as to the work relatedness of her present problems, if any.

The Administrative Law Judge based his finding of a work related injury upon the testimony of the Respondent in order to establish a Haycraft type injury. According to the Administrative Law Judge, the Respondent's testimony taken in conjunction with the medical evidence offered by Dr. Phil Aaron, Dr. Narasimha Reddy, Dr. Kenneth DeSimone and Dr. Morton Kasdan, established causation. (Opinion, Award and Order, p. 7; Order Overruling Petition for Reconsideration, p. 2). The Administrative Law Judge further found that the case of *Caudill* v. *Maloney's Discount Stores,* Ky., 560 S.W.2d 15 (1977), clearly holds that the Plaintiff's testimony is probative evidence in a claim. (Order Overruling Petition for Reconsideration, p. 2). However, the Caudill case does not address the issue of work relatedness. It is acknowledged by the Petitioner that the Respondent's testimony may be probative evidence as to *extent and duration,* however, *medical* testimony is required to establish causation. *Saylers* v. *G & P Coal Co.,* Ky., 467 S.W.2d 115 (1971). Once the Administrative Law Judge reaches the determination that causation exists, based upon *medical* testimony, he may then turn to lay evidence, including the Respondent's testimony, to determine the extent, if any, of occupational disability. *Walker* v. *Porter Prod. Fin., Div. of Porter Paint Co.,* 505 S.W.2d 178 (1974). It is clear that there must be medical evidence of record to establish causation. The Respondent's testimony may be relevant as to extent and duration but only after causation is established within reasonable medical probability.

Regarding the work relatedness or causation element, there are two factors. First, the injury must have arisen out of and in the course of employment. *Jackson* v. *Cowden Manufacturing Co.,* Ky.App., 578 S.W.2d 259 (1978). Second, the resulting condition for which compensation is sought must have been caused by the injuring event. *Markwell & Hartz, Inc.* v. *Pigmen,* Ky., 473 S.W.2d 842 (1971). These requirements are encompassed within the statutory definition of "injury" which is defined to mean

"any work related harmful change in the human organism, arising out of and in the course of employment . . ." KRS 342.620(1). These elements must be established within reasonable medical probability. *Markwell & Hartz, Inc.* v. *Pigmen, supra; Young* v. *L.A. Davidson, Inc.*, Ky., 3 463 S.W.2d 924 (1971). In the present case, there is *no medical* proof that the Respondent's present problems, if any, are a result of her work at Fruit of the Loom. In fact, the *only medical* evidence of record supports a finding that the Respondent's present problems, if any, are not related to her work at Fruit of the Loom.

The only medical proof submitted by the Respondent was through the use of the Form 107 medical report. The information contained in the Form 107 does not by itself establish causation. In the present case, there are no questions in the Form 107 reports submitted by the Respondent which inquire as to causation. It is well settled that the possibility of a causal connection is not enough to prove such a connection as a fact. *Markwell & Hartz, Inc.* v. *Pigmen, supra; Young* v. *L.A. Davidson, Inc.*, Ky. , 463 S.W.2d 921 (1971). The Respondent submitted the Form 107 report of Dr. Phil Aaron. Although Dr. Aaron states that the Plaintiff has problems with her neck, shoulders, arms and wrists which creates a 27% whole body impairment, Dr. Aaron does not specifically state to what he attributes this impairment. (Aaron Form 107). The Respondent also submitted the Form 107 report of Dr. Kenneth DeSimone. Again, Dr. DeSimone does not address the issue of causation. Lastly, the Respondent submitted the 107 report of Dr. Narasimha Reddy. Dr. Reddy performed arthroscopic surgery on the Plaintiff's knee in September, 1990. There is no claim as to a work related injury concerning the Plaintiff's knee. However, the majority of Dr. Reddy's 107 report addresses his arthroscopic surgery of the Plaintiff's knee. Regardless, Dr. Reddy does not address the issue of causation as to any of the Plaintiff's current problems which she claims is a result of her employment at Fruit of the Loom. (Reddy Form 107).

In contrast, the Petitioner submitted medical proof from qualified Board certified physicians. The Administrative Law Judge based his finding of work relatedness, in part, on the testimony of Dr. Morton Kasdan, as submitted by the Petitioner. According to the Administrative Law Judge, Dr. Kasdan's findings of a positive Phalene's test, which indicates numbness, tingling and compression at the Respondent's wrist combined with Dr. Kasdan's expectation that the Respondent would have problems with a return to rapid repetitive work of the upper extremity, supports the Administrative Law Judge's determination of a work related injury. However, Dr. Kasdan's testimony in no way establishes that the Respondent sustained a work related injury. Dr. Kasdan did testify that he would expect the Respondent to have problems with a return to rapid repetitive work, however, Dr. Kasdan also testified that this conclusion was based upon his impression that the Respondent simply did not want to go back to work. (Kasdan Depo., p. 13). Furthermore, Respondent's ability or inability to perform rapid repetitive work by no means addresses the issue of work relatedness or causation. This testimony by Dr. Kasdan may go toward the issue of extent and duration, however, it does not establish a work related injury. The Administrative Law Judge ignores the remaining testimony of Dr. Kasdan wherein he states that the Respondent's present problems are not work related. (Kasdan Depo., p. 9). According to Dr. Kasdan, the fact that the Respondent has been off work since Labor Day, 1989, and that she has continued to have problems with the right arm, wrist, and shoulder, and in her left wrist and in fact has not improved since she stopped working at Fruit of the Loom lends credence to the fact that her problems are not work related as a cumulative trauma disorder will get better with rest. (Kasdan Depo., p. 9) (emphasis added). Clearly, Dr. Kasdan does not opine that the Respondent's present problems, if any, are work related. Quite the contrary, it is Dr. Kasdan's opinion that the Respondent's present problems are *not* work related.

The Respondent also submitted the testimony of a Board certified neurologist, Dr. Dennis O'Keefe. It was Dr. O'Keefe's testimony that the Respondent's history is not consistent with a work related injury since she has been off work since September 6, 1989, and has continued to have complaints of pain with no improvement. (O'Keefe Depo., p. 5, 9). The Respondent also submitted the Form 107 report of Dr. Stanley Collis. Dr. Collis suggested that the Respondent should return to work and specifically opined that she has no work related problems. (Collis Form 107).

The credible and probative medical evidence of record clearly establishes that Respondent's present problems, if any, are not related to her work at Fruit of the Loom. Contrary to the Administrative Law Judge's findings, the medical testimony of Dr. Aaron, Dr. Reddy, Dr. DeSimone and Dr. Kasdan do not establish, 6 within reasonable medical probability, that the Respondent sustained a work related injury. In fact, the medical testimony of Dr. Kasdan, Dr. O'Keefe and Dr. Collis establishes the opposite, the Respondent's problems are *not* related to her employment at Fruit of the Loom. In the absence of medical testimony that the Respondent's condition is a result of her employment at Fruit of the Loom, the Administrative Law Judge cannot find work relatedness without assuming an expert medical proficiency of his own. *Kelly Contracting Company* v. *Robinson*, Ky., 377 S.W.2d 892 (1964). The Administrative Law Judge did just that in the present case, he made a finding of work relatedness without any medical proof to support his findings.

Since the Respondent has failed to establish causation within reasonable medical probability, the Administrative Law Judge's Opinion, Award and order should be overturned and the Respondent's claim should be dismissed.

II.

THE PETITIONER OBJECTS TO THE ADMISSIBILITY OF THE FORM 107 REPORTS OF DR. KENNETH DESIMONE, DR. PHIL AARON, AND DR. NARASIMHA REDDY

The Petitioner renews its objection to the Respondent's use of the Form 107 Medical Report as direct medical testimony. Such use of the Form 107 denies the Petitioner of its right to cross-examine the maker of such report. KRS 342.033. Rather than recite the Petitioner's previous arguments as to the admissibility and constitutionality of the Form 107, the Petitioner's objections, previously filed of record, on November 2, 1990, and November 28, 1990, are hereby incorporated by reference into this brief as if set forth fully herein. For convenience, copies of the Petitioner's objections are attached hereto in the appendix of this brief.

CONCLUSION

In the present case there is no evidence of record to support the Administrative Law Judge's finding of a work related injury. In fact, the probative and credible medical testimony of Dr. Kasdan, Dr. O'Keefe and Dr. Collis, establishes that the Respondent's present problems, if any, are not related to her work at Fruit of the Loom. Furthermore, the Petitioner objects to the admission of the 107 reports of Dr. Aaron, Dr. DeSimone and Dr. Reddy as direct testimony in this case.

WHEREFORE, the Petitioner respectfully requests the decision of the Administrative Law Judge be overturned, and the Respondent's claim be dismissed.

COURT OF APPEALS OF KENTUCKY

File No. 92-CA-002648
(WC-89-000667)

MARY KAY SCEARCE - - - - - - - - - *Appellant*
UNION UNDERWEAR COMPANY, INC. d/b/a FRUIT OF THE LOOM - - - - - - - - *Cross Appellant*

v.

UNION UNDERWEAR COMPANY, INC. d/b/a FRUIT OF THE LOOM and
WORKERS' COMPENSATION BOARD - - - - *Appellees*
MARY KAY SCEARCE and
WORKERS' COMPENSATION BOARD - - *Cross Appellees*

CROSS PETITION FOR REVIEW OF WORKERS' COMPENSATION BOARD DECISION PURSUANT TO 76.25

This the 16th day of November, 1992.

HARNED, ANDERSON & BACHERT
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P. 0. Box 1270
Bowling Green, KY 42102-1270
Telephone (502) 782-3938

By: /s/ Joy D. Denton
Joy D. Denton

CERTIFICATE OF SERVICE:

This will certify that a true and correct copy of the foregoing was this 16th day of November, 1992, placed in the U. S. Mail addressed to the following: Hon. Morris Butler, 624 W. Main St., Greensburg, KY 42743; Hon. Chris F. Gorman, Attorney General, State Capitol, Frankfort, KY 40601; Hon. Thomas A. Dockter, P. 0. Box 280, Louisville, KY 40201-3167; Hon. William A. Miller, Sr., 17th Floor, Kentucky Home Life Bldg., 239 S. 5th Street, Louisville, KY 40202-3269; Hon. W. T. Grant, Commissioner, Department of Workers' Compensation Board, Perimeter Park West, Bldg. C, 1270 Louisville Road, Frankfort, KY 40601.

By: /s/ Joy D. Denton
Joy D. Denton

May It Please The Court:

NAMES AND ADDRESSES OF CROSS APPELLANT AND CROSS APPELLEES AND COUNSEL

The name of the Cross Appellant is Union Underwear Company, Inc. d/b/a Fruit of the Loom, whose counsel is Joy D. Denton, Harned, Anderson & Bachert, P. 0. Box 1270, Bowling Green, Kentucky 42102-1270.

The name of the Cross Appellee is Mary Kay Scearce whose counsel are Morris Butler, Butler, Butler, & Hudson, 202 West Court Street, P. 0. Box 280, Greensburg, Kentucky 42743 and William A. Miller, Sr., 17th Floor, Kentucky Home Life Bldg., 239 S. 5th Street, Louisville, Kentucky 4020-3269.

In accordance with CR 76.25, the Workers' Compensation Board is a Cross Appellee whose representative is Hon. W. T. Grant, Commissioner, Department of Workers' Claims, Building C. Perimeter Park W., 1270 Louisville Road, Frankfort, Kentucky 40601.

STATEMENT OF ISSUES AND MATERIAL FACTS

The only issue raised by the Cross Appellant in this Cross Petition for Review is the Cross Appellant's objec-

tion to the admissibility of the Form 107 reports of Dr. Kenneth DeSimone, Dr. Phil Aaron, and Dr. Narasimha Reddy as submitted by the Cross Appellee, Mary Kay Scearce, as direct medical testimony. Since the Workers' Compensation Board reversed the Administrative Law Judge's Opinion, Award and Order and made a finding that there is no substantial evidence of record to support a finding of work relatedness, the Workers' Compensation Board ruled that this Cross Appellant's appeal, relative to the submission of medical reports as evidence was moot. It is the position of this Cross Appellant that the admissibility and the constitutionality of the Form 107 Report, in workers' compensation proceedings, is an issue of importance. Further, this is an issue of first impression for the Court and one that needs to be addressed and decided by the Court.

In the present case, the only medical testimony submitted by the Cross Appellee, Mary Kay Scearce, was through the Form 107 reports of Dr. Kenneth DeSimone, Dr. Phil Aaron, and Dr. Narasimha Reddy. The Cross Appellant renews its objection to the Cross Appellee's use of the Form 107 medical report as direct medical testimony. The use of the Form 107 denies the Cross Appellant of its right to cross-examine the maker of each report. KRS 342.033. It is the position of the Cross Appellant that if KRS 342.033 is interpreted, by the Court, to allow the Cross Appellee to submit the 107 Reports of Dr. Aaron, Dr. DeSimone and Dr. Reddy, as direct testimony, without requiring the Cross Appellee, Mary Kay Scearce, to produce said physicians, for purposes of cross examination by the Cross Appellant, either at the hearing or by deposition, at the expense of the Cross Appellee, Mary Kay Scearce, then KRS 342.033 and 803 KAR 25:011 13 are unconstitutional as a denial of due process of law, an improper delegation of legislative authority and void for vagueness.

In the alternative, should the Court interpret KRS 342.033 and 803 KAR 25:011 § 13 to allow the Cross Appellee, Mary Kay Scearce, to submit the 107 Reports of Dr. Aaron, Dr. DeSimone and Dr. Reddy so long as said physi-

cians are produced for cross examination by the Cross Appellant, at the expense of the Cross Appellee, Mary Kay Scearce, KRS 342.033 and 803 KAR 25:011 § 13 are not unconstitutional as a denial of due process of law, an improper delegation of legislative authority or void for vagueness. However, the Form 107 Reports of Dr. Aaron, Dr. DeSimone and Dr. Reddy, in the present case, must be stricken from the record as the Cross Appellant's motion to require the Cross Appellee, Mary Kay Scearce, to produce said physicians for cross examination, at the expense of the Cross Appellee, was overruled by the Administrative Law Judge. (See Administrative Law Judge's Orders of November 16, 1990; December 4, 1990; and December 6, 1990).

Rather than to recite the Cross Appellant's previous arguments as to the admissibility and constitutionality of the Form 107, the Cross Appellant's objections, previously filed of record, on November 2, 1990 (objection to the Form 107 Report of Dr. Aaron) , and November 28, 1990 (objections to the Form 107 Reports of Dr. DeSimone and Dr. Reddy) , are hereby incorporated by reference into this Cross Petition for Review as it set forth fully herein. Copies of the Cross Appellant's objections are attached hereto in the Appendix of this Cross Petition for Review.

WHEREFORE, the Cross Appellant, Union Underwear Company, Inc. d/b/a Fruit of the Loom, respectfully requests that the Court find that KRS 342.033 and 803 KAR 25:011 §13 are unconstitutional as a denial of due process of law, an improper delegation of legislative authority and void for vagueness.

This 16th day of November, 1992.

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APPENDIX

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS

Claim No. 89-00667

MARY KAY SCEARCE - - - - - - - - *Plaintiff*

v.

FRUIT OF THE LOOM - - - - - - - - *Defendant*

DEFENDANT'S DEMAND OF RIGHT OF CROSS-EXAMINATION AND MOTION TO PRODUCE PHYSICIAN, AND OBJECTION TO ADMISSIBILITY OF MEDICAL REPORT

Plaintiff has filed a motion to submit the medical report of Dr. A. Narashima Reddy dated November 13, 1990, as direct testimony pursuant to KRS 342.033. Pursuant to that same statute, Defendant demands the right to cross-examine Dr. Reddy and demands that Plaintiff be required to produce Dr. Reddy for cross-examination at a reasonable time at the expense of Plaintiff as a prerequisite to the admissibility of Dr. Reddy's report. In addition, Defendant, pursuant to KRS 342.033, objects to the admissibility of said report and, pursuant to 803 KAR 25:011, Section 13(8), states the grounds for the objection herein. In the following portions of this pleading, we will first point out in Section I the reasons Defendant has an absolute right to cross-examine Dr. Reddy and why such an absolute right requires that Plaintiff be required to schedule and pay for the depositions which will provide the right of cross-examination to Defendant. Stated simply, unless the right of cross-examination is absolute and unless the burden of furnishing the opportunity to exercise the right is borne by Plaintiff, KRS 342.033 is unconstitutional as a denial of due process of law, an improper delegation of

legislative authority, and void for vagueness. After discussing the absolute right of Defendant to cross-examine Dr. Reddy, we will note with particularity the objections to his report in Section II below.

I.

DEFENDANT HAS AN ABSOLUTE RIGHT TO CROSS-EXAMINE DR. REDDY; THE BURDEN OF SCHEDULING AND PAYING FOR SUCH CROSS-EXAMINATION RESTS UPON THE PLAINTIFF.

A long line of Kentucky cases, including *Brooks* v. *Island Creek Coal Company,* Ky. App., 678 S.W.2d 791 (1984), hold that the Workers' Compensation Act should be interpreted in a manner which will render it constitutional rather than unconstitutional. Thus, if the constitutional guarantee of due process would require that before the medical report of Dr. Reddy may be considered as evidence the Defendant must be provided an absolute right to cross-examine Dr. Reddy at the expense of the Plaintiff, then the Act should be so interpreted and applied.

It is well established in Kentucky law that the right of cross-examination is a fundamental adjunct of due process and must be provided in administrative proceedings which are adversarial in nature. *Kaelin* v. *City of Louisville,* Ky., 643 S.W.2d 590 (1982). *Black Mountain Corporation* v. *Williams,* Ky., 193 S.W.2d 416 (1946), holds that evidence produced in workers' compensation proceedings must be in a form authorized by customary legal procedures. The appellate courts of other states as well have recognized that while the evidentiary rules in an administrative proceeding may be relaxed, they cannot be relaxed to a point of dispensing with the right of cross-examination which is fundamental in Anglo-Saxon law. *Employers Commercial Union Insurance Group* v. *Schoen,* Alaska, 519 P.2d 819 (1974). In fact, the United States Supreme Court has recognized that the right to cross-examine an adverse party in administrative proceedings is constitutionally protected. *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Likewise, the Supreme Court of Montana, in

Hert v. *J. J. Newberry Company,* Mont., 587 P.2d 11 (1978), held that every party to a workers' compensation proceeding has an absolute right to cross-examine adverse witnesses as part of the due process requirements imposed in workers' compensation proceedings.

Given that there is an absolute right to cross-examine adverse witnesses in workers' compensation cases, the question which next arises in connection with medical reports such as that of Dr. Reddy is: who is to bear the responsibility of producing the witness (by scheduling the witness's deposition) and defraying the expenses incurred in providing the opportunity to cross-examine. Although it appears that there is no guiding authority responsive to this question in the jurisprudence of Kentucky, other states have had the opportunity to examine the question under similar circumstances and statutes, and have determined that the proponent of the medical report must make the author of the report available for cross-examination and must bear the expense of providing the opportunity of cross-examination to the adverse party. In *Hert* v. *J. J. Newberry Company, supra,* the Supreme Court of Montana stated:

> Thus, it is the duty of any party before the Workers' Compensation Court, whether he be worker, employer, or carrier, if that party intends to rely on the medical evidence in a written medical report, to present the medical person or expert who is the author of the same for cross-examination either by deposition or by testimony at the hearing. 587 P.2d at 13.

Likewise, the Court of Appeals of Oregon, in *Hanna* v. *McGrew Bros. Sawmill, Inc.,* Ore. App., 605 P.2d 724 (1980), states:

> The procedure of offering medical testimony through the medium of written reports does not alter the status of the witness when he is called for the purposes of cross-examination. He still remains the witness of the party offering the medical reports and that party is responsible for paying the fees and expenses incident to his appearance as a witness for cross-examination. 605 P.2d at 728.

Again, the Rhode Island Supreme Court, in *Drake Bakeries, Inc.* v. *Butler,* R.I., 178 A.2d 295 (1962), states:

> The proceedings under the Workmen's Compensation Act are necessarily adverse in nature, and the parties are free to produce such evidence and testimony as they deem essential to the interest of their respective causes. The cost of producing such evidence or testimony properly falls on the producing party. 178 A.2d at 299.

The appellate courts of many other states have rendered similar decisions. However, in order to avoid unnecessarily lengthening this response, we will simply cite some of the appellate decisions of other states which recognize that it is the duty of the proponent of a medical report to produce the author of the report for cross-examination and to defray the expenses incurred in connection with such cross-examination. These cases include: *Commercial Union Companies* v. *Smallwood,* Alaska, 550 P.2d 1261 (1976); *Chavez* v. *Industrial Commission,* Ariz., 425 P.2d 864 (1967); *Doss* v. *American Ventures, Inc.,* La., 224 So.2d 470 (1969); *Chambers* v. *Bigelow-Liptak Corp.,* Ark., 344 S.W.2d 588 (1961); and *Natalizia* v. *Atlantic Tubing & Rubber Co.,* R.I., 105 A.2d 190 (1954).

The fact that requiring the Plaintiff in the instant case to produce Dr. Reddy for cross-examination will cause the Plaintiff to incur additional monetary expense has been held an insufficient basis to dispose of the requirement that the proponent of evidence produce the witness for cross-examination. As stated by the Superior Court of New Jersey in *Paco* v. *American Leather Mfg. Co.,* N.J. Super., 516 A.2d 623 (1986):

> The high cost of producing medical testimony, although a heavy burden for the injured employee to bear in some instances, simply cannot justify the trammeling of fundamental rights in a contested formal proceeding.

In like manner, the Arizona Court of Appeals, in *Jones* v. *Industrial Commission,* Ariz. App., 401 P.2d 172 (1965), states:

> The party entitled to the right or "opportunity" for cross-examination should not be compelled to expend money or effort in obtaining that "opportunity".

We would note, further, that if KRS 342.033 were applied in such a manner as to allow the Workers' Compensation Board to adopt regulations which do not protect the absolute right of an adversary to cross-examine the proponent's witnesses at the expense of the proponent, then KRS 342.033 would violate the well-recognized prohibition against the delegation of legislative authority in the absence of standards or safeguards governing the exercise of such authority. See *Miller* v. *Covington Development Authority*, Ky., 539 S.W.2d 1 (1976), and *Butler* v. *United Cerebral Palsy of Northern Kentucky, Inc.*, Ky., 352 S.W.2d 203 (1961). KRS 342.033, on its face, contains absolutely no standards or safeguards to govern the Board in promulgating regulations concerning the use of written medical reports as direct testimony. Unless the safeguard of an absolute right of cross-examination at the proponent's expense is implied in the statute, it is violative of the rule recognized in *Miller* and *Butler* and is unconstitutionally vague. Once again, since a constitutional interpretation and application of statutes is favored, *Brooks, supra*, KRS 342.033 must be interpreted so as to protect the absolute right of cross-examination at the expense of the proponent.

II.

OBJECTIONS TO THE ADMISSIBILITY OF DR. REDDY'S MEDICAL REPORT.

In addition to demanding its right to cross-examine Dr. Reddy as set forth above, Defendant objects to the admissibility of said report on the following specific grounds pursuant to 803 KAR 25:011, Section 13(8):

A. Admission of Dr. Reddy's Medical Report amounts to allowing the proponent to introduce unsworn medical testimony in violation of due process requirements and Board regulations. The regulations which permit a medical report to be filed do not require that the medical report be subscribed and sworn by the physician making the re-

port, but simply require that the report be signed. Thus, in essence, the regulations which allow a medical report to be filed on Form 107 allow the introduction of unsworn medical testimony. Allowing the introduction of unsworn medical testimony is in conflict with 803 KAR 25:011 Section 16(1), which requires that the rules of evidence which apply generally in the Commonwealth of Kentucky shall apply in workers' compensation cases. CR 43.04 (1) states the general rule and requires that testimony given in a civil proceeding be under oath.

To allow unsworn medical testimony in the form of the Form 107 report is thus in conflict with one of the most basic requirements of evidence law—that testimony be given under oath or affirmation in order for the testimony to be competent. Accordingly, the regulations which allow the introduction of unsworn medical testimony deprive those persons against whom such evidence is introduced of due process of law.

B. The Form 107 omits important issues from inquiry, most notably issues relevant to the apportionment of liability between the Employer and the Special Fund.

C. The Form 107 elicits inadmissible medical opinions from the witness. Question No. 3 of Section F of the Form 107 asks the medical witness to express an opinion as to whether the Plaintiff is functional impairment will have an occupational implication greater than the functional impairment assessed. In essence, this section of the Form 107 asks the medical witness to express an opinion as to occupational disability. Kentucky's courts have held on numerous occasions that a medical examiner should evaluate the impairment of bodily function, and the evaluation of occupational disability is a legal or administrative task. As stated in *Congleton Brothers, Inc.* v. *Farmer*, Ky., 399 S.W.2d 722 (1966):

> We consider it appropriate to repeat the admonition given in *Kilgore* v. *Goose Creek Coal Co.*, Ky., 392 S.W.2d 78, that, while a medical examiner should evaluate the impairment of bodily function, it is a

> legal or administrative task to evaluate occupational disability.

Kentucky's highest court has stated that the medical expert should confine his testimony to medical matters. As stated in *Griffith* v. *Blair,* Ky., 430 S.W.2d 377 (1968):

> We agree with appellee's contention that a medical expert may not usurp the function of the Board by giving testimony which, in the form of a medical opinion, expresses a legal conclusion.

The seminal case of *Osborne* v. *Johnson,* Ky., 432 S W. 2d 800 (1968), discusses the difference between functional impairment and occupational disability. Question No. 3 in Section F of the Form 107 clearly asks the medical witness to express an opinion as to occupational disability, thereby asking the medical witness to express an opinion upon matters concerning which the witness is not qualified as an expert.

Since the Form 107 elicits opinions which are violative of well-recognized evidentiary rules which apply in workers' compensation cases, we submit that the motion to submit the report of Dr. Reddy on said form should be overruled.

D. Under Section G of the Form 107 the witness is asked to assess the functional capacity of the Plaintiff. These questions are suggestive and do not allow the witness to express his or her own opinion. For example, there is no space provided in which the physician can indicate that the Plaintiff is able to lift 100 pounds or more. There is no space provided wherein the witness can, for example, express the opinion that the Plaintiff is able to lift 35 pounds or less.

The Form 107, rather than suggesting a list of responses from which the witness may choose, should simply solicit the witness's opinions.

E. In Question No. 2 of Section F of Form 107, it is suggested to the witness that the AMA Guidelines may not adequately assess the medical impairment of the Plaintiff. Rather than suggesting a response in this manner,

the question should simply elicit the expert's opinion as to whether or not the AMA Guidelines adequately assess the medical impairment of the claimant. If the doctor does not feel that the AMA Guides adequately assess medical impairment in any particular case, the doctor should be asked to explain why the AMA Guides are not adequate.

F. Without waiving the foregoing objections, the Defendant further objects to the introduction of Dr. Reddy's 107 Report as said report also addresses Dr. Reddy's treatment of the Plaintiff for a non work related problem. Dr. Reddy's Form 107 Report refers to an arthroscopic surgery he performed on the Plaintiff's knee. Obviously, some of the restrictions imposed by Dr. Reddy relate to that surgery. It is impossible to separate Dr. Reddy's opinion as to the Plaintiff Is alleged work related injury and his opinion as to the Plaintiff Is knee problem.

III.

MOTION TO PRODUCE PHYSICIAN FOR CROSS-EXAMINATION

Comes now the Defendant, by counsel, and for its Motion for an order from the Administrative Law Judge directing the Plaintiff to produce Dr. Reddy for cross-examination at the Plaintiff's expense, states as follows:

1. The Defendant moves the Administrative Law Judge for an order directing the Plaintiff to produce Dr. Reddy for cross-examination by the Defendant at the Plaintiff Is expense, either by deposition or at the time of the hearing to be held in this case. In support of this motion, the Defendant incorporates herein by reference the authority cited herein in its "Demand of Right of Cross-Examination and Objection to Admissibility of Medical Report," above.

WHEREFORE, Defendant prays that the Plaintiffs motion to file the medical report of Dr. Reddy as direct testimony be overruled or that, in the alternative, this Defendant's absolute right to cross-examine Dr. Reddy be recognized and that the Plaintiff be directed to arrange for the deposition of Dr. Reddy at the Plaintiff's expense, either by deposition or at the hearing, as a prerequisite to

the consideration of Dr. Reddy's medical report as evidence.

Respectfully submitted this 28th day of November, 1990.

HARNED, ANDERSON & BACHERT
324 E. 10th Ave.
P. 0. Box 1270
Bowling Green, KY 42102-1270
Telephone: (502)782-3938

By: _____
Joy D. Denton

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing were this ___ day of November, 1990, placed in the U. S. Mail addressed to the following:

BUTLER, BUTLER & HUDSON
Mr. Morris Butler
202 W. Court St., P.O. Box 280
Greensburg, KY 42743

Hon. Thomas A. Dockter
Administrative Law Judge
P.O. Box 3167
Louisville, KY 40201-3167

Hon. Frederic J. Cowan, Jr.
Attorney General
State Capitol
Frankfort, KY 40601

_____
Joy D. Denton

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS

Claim No. 89-00667

MARY KAY SCEARCE - - - - - - - - *Plaintiff*

v.

FRUIT OF THE LOOM - - - - - - - - *Defendant*

DEFENDANT'S DEMAND OF RIGHT OF CROSS-EXAMINATION AND MOTION TO PRODUCE PHYSICIAN, AND OBJECTION TO ADMISSIBILITY OF MEDICAL REPORT

Plaintiff has filed a motion to submit the medical report of Dr. Kenneth J.S. DeSimone dated November 12, 1990, as direct testimony pursuant to KRS 342.033. Pursuant to that same statute, Defendant demands the right to cross-examine Dr. DeSimone and demands that Plaintiff be required to produce Dr. DeSimone for cross-examination at a reasonable time at the expense of Plaintiff as a prerequisite to the admissibility of Dr. DeSimone's report. In addition, Defendant, pursuant to KRS 342.033, objects to the admissibility of said report and, pursuant to 803 KAR 25:011, Section 13 (8), states the grounds for the objection herein. In the following portions of this pleading, we will first point out in Section I the reasons Defendant has an absolute right to cross-examine Dr. DeSimone and why such an absolute right requires that Plaintiff be required to schedule and pay for the depositions which will provide the right of cross-examination to Defendant. Stated simply, unless the right of cross-examination is absolute and unless the burden of furnishing the opportunity to exercise the right is borne by Plaintiff, KRS 342.033 is unconstitutional as a denial of due process of law, an im-

proper delegation of legislative authority, and void for vagueness. After discussing the absolute right of Defendant to cross-examine Dr. DeSimone, we will note with particularity the objections to his report in Section II below.

I.

DEFENDANT HAS AN ABSOLUTE RIGHT TO CROSS-EXAMINE DR. DESIMONE; THE BURDEN OF SCHEDULING AND PAYING FOR SUCH CROSS-EXAMINATION RESTS UPON THE PLAINTIFF.

A long line of Kentucky cases, including *Brooks* v. *Island Creek Coal Company,* Ky.App., 678 S.W.2d 791 (1984), hold that the Workers' Compensation Act should be interpreted in a manner which will render it constitutional rather than unconstitutional. Thus, if the constitutional guarantee of due process would require that before the medical report of Dr. DeSimone may be considered as evidence the Defendant must be provided an absolute right to cross-examine Dr. DeSimone at the expense of the Plaintiff, then the Act should be so interpreted and applied.

It is well established in Kentucky law that the right of cross-examination is a fundamental adjunct of due process and must be provided in administrative proceedings which are adversarial in nature. *Kaelin* v. *City of Louisville,* Ky., 643 S.W.2d 590 (1982). *Black Mountain Corporation* v. *Williams,* Ky., 193 S.W. 2d 416 (1946) holds that evidence Produced in workers' compensation proceedings must be in a form authorized by customary legal procedures. The appellate courts of other states as well have recognized that while the evidentiary rules in an administrative proceeding may be relaxed, they cannot be relaxed to a point of dispensing with the 2 right of cross-examination which is fundamental in Anglo-Saxon law. *Employers Commercial Union Insurance Group* v. *Schoen,* Alaska, 519 P.2d 819 (1974). In fact, the United States Supreme Court has recognized that the right to cross-examine an adverse party in administrative proceedings is constitutionally protected. *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S.Ct. 1011; 25 L.Ed.2d

287 (1970). Likewise, the Supreme Court of Montana, in *Hert* v. *J. J. Newberry Company,* Mont., 587 P.2d 11 (1978), held that every party to a workers' compensation proceeding has an absolute right to cross- examine adverse witnesses as part of the due process requirements imposed in workers' compensation proceedings.

Given that there is an absolute right to cross-examine adverse witnesses in workers' compensation cases, the question which next arises in connection with medical reports such as that of Dr. DeSimone is: who is to bear the responsibility of producing the witness (by scheduling the witness's deposition) and defraying the expenses incurred in providing the opportunity to cross-examine. Although it appears that there is no guiding authority responsive to this question in the jurisprudence of Kentucky, other states have had the opportunity to examine the question under similar circumstances and statutes, and have determined that the proponent of the medical report must make the author of the report available for cross-examination and must bear the expense of providing the opportunity of cross-examination to the adverse party. In *Hert* v. *J. J. Newberry Company, supra,* the Supreme Court of Montana stated:

> Thus, it is the duty of any party before the Workers' Compensation Court, whether he be worker, employer, or carrier, if that party intends to rely on the medical evidence in a written medical report, to present the medical person or expert who is the author of the same for cross-examination either by deposition or by testimony at the hearing. 587 P.2d at 13.

Likewise, the Court of Appeals of Oregon, in *Hanna* v. *McGrew Bros. Sawmill, Inc.,* Ore.App., 605 P.2d 724 (1980), states:

> The procedure of offering medical testimony through the medium of written reports does not alter the status of the witness when he is called for the purposes of cross-examination. He still remains the witness of the party offering the medical reports and that party is responsible for paying the fees and expenses incident to his appearance as a witness for cross-examination. 605 P.2d at 728.

Again, the Rhode Island Supreme Court, in *Drake Bakeries, Inc.* v. *Butler,* R.I., 178 A.2d 295 (1962), states:

> The proceedings under the Workmen's Compensation Act are necessarily adverse in nature, and the parties are free to produce such evidence and testimony as they deem essential to the interest of their respective causes. The cost of producing such evidence or testimony properly falls on the producing party. 178 A.2d at 299.

The appellate courts of many other states have rendered similar decisions. However, in order to avoid unnecessarily lengthening this response, we will simply cite some of the appellate decisions of other states which recognize that it is the duty of the proponent of a medical report to produce the author of the report for cross-examination and to defray the expenses incurred in connection with such cross-examination. These cases include: *Commercial Union Companies* v. *Smallwood,* Alaska, 550 P.2d 1261 (1976); *Chavez* v. *Industrial Commission,* Ariz., 425 P.2d 864 (1967); *Doss* v. *American Ventures. Inc.,* La., 224 So. 2d 470 (1969); *Chambers* v. *Bigelow-Liptak Corp.,* Ark., 344 S.W. 2d 588 (1961); and *Natalizia* v. *Atlantic Tubing & Rubber Co.,* R.I., 105 A.2d 190 (1954).

The fact that requiring the Plaintiff in the instant case to produce Dr. DeSimone for cross-examination will cause the Plaintiff to incur additional monetary expense has been held an insufficient basis to dispose of the requirement that the proponent of evidence produce the witness for cross-examination. As stated by the Superior Court of New Jersey in *Paco* v. *American Leather Mfg. Co.,* N.J. Super., 516 A.2d 623 (1986):

> The high cost of producing medical testimony, although a heavy burden for the injured employee to bear in some instances, simply cannot justify the trammeling of fundamental rights in a contested formal proceeding.

In like manner, the Arizona Court of Appeals, in *Jones* v. *Industrial Commission,* Ariz. App., 401 P.2d 172 (1965), states:

> The party entitled to the right or "opportunity" for cross-examination should not be compelled to expend money or effort in obtaining that "opportunity".

We would note., further, that if KRS 342.033 were applied in such a manner as to allow the Workers' Compensation Board to adopt regulations which do not protect the absolute right of an adversary to cross-examine the proponent's witnesses at the expense of the proponent, then KRS 342.033 would violate the well-recognized prohibition against the delegation of legislative authority in the absence of standards or safeguards governing the exercise of such authority. See *Miller* v. *Covington Development Authority,* Ky., 539 S.W.2d 1 (1976), and *Butler* v. *United Cerebral Palsy of Northern Kentucky, Inc.,* Ky., 352 S.W.2d 203 (1961). KRS 342.033, on its face, contains absolutely no standards or safeguards to govern the Board in promulgating regulations concerning the use of written medical reports as direct testimony. Unless the safeguard of an absolute right of cross-examination at the proponent's expense is implied in the statute, it is violative of the rule recognized in *Miller* and *Butler* and is unconstitutionally vague. Once again, since a constitutional interpretation and application of statutes is favored, *Brooks, supra,* KRS 342.033 must be interpreted so as to protect the absolute right of cross-examination at the expense of the proponent.

II.

OBJECTIONS TO THE ADMISSIBILITY OF DR. DESIMONE'S MEDICAL REPORT.

In addition to demanding its right to cross-examine Dr. DeSimone as set forth above, Defendant objects to the admissibility of said report on the following specific grounds pursuant to 803 KAR 25:011, Section 13(8):

A. Admission of Dr. DeSimone's Medical Report amounts to allowing the proponent to introduce unsworn medical testimony in violation of due process requirements and Board regulations. The regulations which permit a medical report to be filed do not require that the medical report be subscribed and sworn by the physician making

the report, but simply require that the report be signed. Thus, in essence, the regulations which allow a medical report to be filed on Form 107 allow the introduction of unsworn medical testimony. Allowing the introduction of unsworn medical testimony is in conflict with 803 KAR 25:011 Section 16(1), which requires that the rules of evidence which apply generally in the Commonwealth of Kentucky shall apply in workers' compensation cases. CR 43.04(1) states the general rule and requires that testimony given in a civil proceeding be under oath.

To allow unsworn medical testimony in the form of the Form 107 report is thus in conflict with one of the most basic requirements of evidence law—that testimony be given under oath or affirmation in order for the testimony to be competent. Accordingly, the regulations which allow the introduction of unsworn medical testimony deprive those persons against whom such evidence is introduced of due process of law.

B. The Form 107 omits important issues from inquiry, most notably issues relevant to the apportionment of liability between the Employer and the Special Fund.

C. The Form 107 elicits inadmissible medical opinions from the witness. Question No. 3 of Section F of the Form 107 asks the medical witness to express an opinion as to whether the Plaintiff's functional impairment will have an occupational implication greater than the functional impairment assessed. In essence, this section of the Form 107 asks the medical witness to express an opinion as to occupational disability. Kentucky's courts have held on numerous occasions that a medical examiner should evaluate the impairment of bodily function, and the evaluation of occupational disability is a legal or administrative task. As stated in *Congleton Brothers, Inc.* v. *Farmer,* Ky., 399 S.W.2d 722 (1966):

> We consider it appropriate to repeat the admonition given in *Kilgore* v. *Goose Creek Coal Co.,* Ky., 392 S.W.2d 78, that, while a medical examiner should evaluate the impairment of bodily function, it is a

> legal or administrative task to evaluate occupational disability.

Kentucky's highest court has stated that the medical expert should confine his testimony to medical matters. As stated in *Griffith* v. *Blair,* Ky., 430 S.W.2d 377 (1968):

> We agree with appellee's contention that a medical expert may not usurp the function of the Board by giving testimony which, in the form of a medical opinion, expresses a legal conclusion.

The seminal case of *Osborne* v. *Johnson,* Ky., 432 S.W. 2d 800 (1968), discusses the difference between functional impairment and occupational disability. Question No. 3 in Section F of the Form 107 clearly asks the medical witness to express an opinion as to occupational disability, thereby asking the medical witness to express an opinion upon matters concerning which the witness is not qualified as an expert.

Since the Form 107 elicits opinions which are violative of well-recognized evidentiary rules which apply in workers' compensation cases, we submit that the motion to submit the report of Dr. DeSimone on said form should be overruled.

D. Under Section G of the Form 107 the witness is asked to assess the functional capacity of the Plaintiff. These questions are suggestive and do not allow the witness to express his or her own opinion. For example, there is no space provided in which the physician can indicate that the Plaintiff is able to lift 100 pounds or more. There is no space provided wherein the witness can, for example, express the opinion that the Plaintiff is able to lift 35 pounds or less.

The Form 107, rather than suggesting a list of responses from which the witness may choose, should simply solicit the witness's opinions.

E. In Question No. 2 of Section F of Form 107, it is suggested to the witness that the AMA Guidelines may not adequately assess the medical impairment of the Plain-

tiff. Rather than suggesting a response in this manner, the question should simply elicit the expert's opinion as to whether or not the AMA Guidelines adequately assess the medical impairment of the claimant. If the doctor does not feel that the AMA Guides adequately assess medical impairment in any particular case, the doctor should be asked to explain why the AMA Guides are not adequate.

III.

MOTION TO PRODUCE PHYSICIAN FOR CROSS-EXAMINATION

Comes now the Defendant, by counsel, and for its Motion for an Order from the Administrative Law Judge directing the Plaintiff to produce Dr. DeSimone for cross-examination at the Plaintiff's expense, states as follows:

1. The Defendant moves the Administrative Law Judge for an Order directing the Plaintiff to produce Dr. DeSimone for cross-examination by the Defendant at the Plaintiff's expense, either by deposition or at the time of the hearing to be held in this case. In support of this motion, the Defendant incorporates herein by reference the authority cited herein in its "Demand of Right of Cross-Examination and Objection to Admissibility of Medical Report," above.

WHEREFORE, Defendant prays that the Plaintiff's motion to file the medical report of Dr. DeSimone as direct testimony be overruled or that, in the alternative, this Defendant's absolute right to cross-examine Dr. DeSimone be recognized and that the Plaintiff be directed to arrange for the deposition of Dr. DeSimone at the Plaintiff's expense, either by deposition or at the hearing, as a prerequisite to the consideration of Dr. DeSimone's medical report as evidence.

Respectfully submitted this 28th day of November, 1990.

HARNED, ANDERSON & BACHERT
324 E. 10th Ave.
P. 0. Box 1270
Bowling Green, KY 42102-1270
Telephone: (502)782-3938

By: _____
Joy D. Denton

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing were this ___ day of November, 1990, placed in the U. S. Mail addressed to the following:

Hon. Frederic J. Cowan, Jr.
Attorney General
State Capitol
Frankfort, KY 40601

BUTLER, BUTLER & HUDSON
P.O. Box 280
Greensburg, KY 42743

Hon. Thomas A. Dockter
P.O. Box 3167
Louisville, KY 40201-3167

_____
Joy D. Denton

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS

Claim No. 89-00667

MARY KAY SCEARCE - - - - - - - - - *Plaintiff*

v.

FRUIT OF THE LOOM - - - - - - - - - *Defendant*

DEFENDANT'S DEMAND OF RIGHT OF CROSS-EXAMINATION AND MOTION TO PRODUCE PHYSICIAN, AND OBJECTION TO ADMISSIBILITY OF MEDICAL REPORT

Plaintiff has filed a motion to submit the medical report of Dr. Oris Aaron dated August 31, 1990, as direct testimony pursuant to KRS 342.033. Pursuant to that same statute, Defendant demands the right to cross-examine Dr. Aaron and demands that Plaintiff be required to produce Dr. Aaron f or cross-examination at a reasonable time at the expense of Plaintiff as a prerequisite to the admissibility of Dr. Aaron's report. In addition, Defendant, pursuant to KRS 342.033, objects to the admissibility of said report and, pursuant to 803 KAR 25:011, Section 13(8), states the grounds for the objection herein. In the following portions of this pleading, we will first point out in Section I the reasons Defendant has an absolute right to cross-examine Dr. Aaron and why such an absolute right requires that Plaintiff be required to schedule and pay for the depositions which will provide the right of cross-examination to Defendant. Stated simply, unless the right of cross-examination is absolute and unless the burden of furnishing the opportunity to exercise the right is borne by Plaintiff, KRS 342.033 is unconstitutional as a denial of due process of law, an improper delegation of

legislative authority, and void for vagueness. After discussing the absolute right of Defendant to cross-examine Dr. Aaron, we will note with particularity the objections to his report in Section II below.

I.

DEFENDANT HAS AN ABSOLUTE RIGHT TO CROSS-EXAMINE DR. AARON; THE BURDEN OF SCHEDULING AND PAYING FOR SUCH CROSS-EXAMINATION RESTS UPON THE PLAINTIFF.

A long line of Kentucky cases, including *Brooks* v. *Island Creek Coal Company*, Ky.App., 678 S.W.2d 791 (1984), hold that the Workers' Compensation Act should be interpreted in a manner which will render it constitutional rather than unconstitutional. Thus, if the constitutional guarantee of due process would require that before the medical report of Dr. Aaron may be considered as evidence the Defendant must be provided an absolute right to cross-examine Dr. Aaron at the expense of the Plaintiff, then the Act should be so interpreted and applied.

It is well established in Kentucky law that the right of cross-examination is a fundamental adjunct of due process and must be provided in administrative proceedings which are adversarial in nature. *Kaelin* v. *City of Louisville*, Ky., 643 S.W.2d 590 (1982). *Black Mountain Corporation* v. *Williams*, Ky., 193 S.W.2d 416 (1946), holds that evidence produced in workers' compensation proceedings must be in a form authorized by customary legal procedures. The appellate courts of other states as well have recognized that while the evidentiary rules in an administrative proceeding may be relaxed, they cannot be relaxed to a point of dispensing with the right of cross-examination which is fundamental in Anglo-Saxon law. *Employers Commercial Union Insurance Group* v. *Schoen*, Alaska, 519 P.2d 819 (1974). In fact, the United States, Supreme Court has recognized that the right to cross-examine an adverse party in administrative proceedings is constitutionally protected. *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Likewise, the Supreme Court of Montana, in

Hert v. *J. J. Newberry Company,* Mont., 587 P.2d 11 (1978), held that every party to a workers' compensation proceeding has an absolute right to cross-examine adverse witnesses as part of the due process requirements imposed in workers' compensation proceedings.

Given that there is an absolute right to cross-examine adverse witnesses in workers' compensation cases, the question which next arises in connection with medical reports such as that of Dr. Aaron is: who is to bear the responsibility of producing the witness (by scheduling the witness's deposition) and defraying the expenses incurred in providing the opportunity to cross-examine. Although it appears that there is no guiding authority responsive to this question in the jurisprudence of Kentucky, other states have had the opportunity to examine the question under similar circumstances and statutes, and have determined that the proponent of the medical report must make the author of the report available for cross-examination and must bear the expense of providing the opportunity of cross-examination to the adverse party. In *Hert* v. *J. T. Newberry Company, supra,* the Supreme Court of Montana stated:

> Thus, it is the duty of any party before the Workers' Compensation Court, whether he be worker, employer, or carrier, if that party intends to rely on the medical evidence in a written medical report, to present the medical person or expert who is the author of the same for cross-examination either by deposition or by testimony at the hearing. 587 P. 2d at 13.

Likewise, the Court of Appeals of Oregon, in *Hanna* v. *McGrew Bros Sawmill, Inc.,* Ore.App., 605 P.2d 724 (1980), states:

> The procedure of offering medical testimony through the medium of written reports does not alter the status of the witness when he is called for the purposes of cross-examination. He still remains the witness of the party offering the medical reports and that party is responsible for paying the fees and expenses incident to his appearance as a witness for cross-examination. 605 P.2d at 728.

Again, the Rhode Island Supreme Court, in *Drake Bakeries, Inc.* v. *Butler,* R.I., 178 A.2d 295 (1962), states:

> The proceedings under the Workmen's Compensation Act are necessarily adverse in nature, and the parties are free to produce such evidence and testimony as they deem essential to the interest of their respective causes. The cost of producing such evidence or testimony properly falls on the producing party. 178 A.2d at 299.

The appellate courts of many other states have rendered similar decisions. However, in order to avoid unnecessarily lengthening this response, we will simply cite some of the appellate decisions of other states which recognize that it is the duty of the proponent of a medical report to produce the author of the report for cross-examination and to defray the expenses incurred in connection with such cross-examination. These cases include: *Commercial Union Companies* v. *Smallwood,* Alaska, 550 P. 2d 1261 (1976) ; *Chavez* v. *Industrial Commission,* Ariz., 425 P.2d 864 (1967) ; *Doss* v. *American Ventures, Inc.,* La., 224 So.2d 470 (1969) ; *Chambers* v. *Bigelow-Liptak Corp.,* Ark., 344 S.W.2d 588 (1961) ; and *Natalizia* v. *Atlantic Tubing & Rubber Co.,* R.I., 105 A.2d 190 (1954).

The fact that requiring the Plaintiff in the instant case to produce Dr. Aaron for cross-examination will cause the Plaintiff to incur additional monetary expense has been held an insufficient basis to dispose of the requirement that the proponent of evidence produce the witness for cross-examination. As stated by the Superior Court of New Jersey in *Paco* v. *American Leather Mfg. Co.,* N.J. Super., 516 A.2d 623 (1986):

> The high cost of producing medical testimony, although a heavy burden for the injured employee to bear in some instances, simply cannot justify the trammeling of fundamental rights in a contested formal proceeding.

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> The party entitled to the right or "opportunity" for cross-examination should not be compelled to expend money or effort in obtaining that "opportunity".

We would note, further, that if KRS 342.033 were applied in such a manner as to allow the Workers' Compensation Board to adopt regulations which do not protect the absolute right of an adversary to cross-examine the proponent's witnesses at the expense of the proponent, then KRS 342.033 would violate the well-recognized prohibition against the delegation of legislative authority in the absence of standards or safeguards governing the exercise of such authority. See *Miller* v. *Covington Development Authority*, Ky., 539 S.W.2d 1 (1976), and *Butler* v. *United Cerebral 'Palsy of Northern Kentucky, Inc.*, Ky., 352 S.W.2d 203 (1961). KRS 342.033, an its face, contains absolutely no standards or safeguards to govern the Board in promulgating regulations concerning the use of written medical reports as direct testimony. Unless the safeguard of an absolute right of cross-examination at the proponent's expense is implied in the statute, it is violative of the rule recognized in *Miller* and *Butler* and is unconstitutionally vague. Once again, since a constitutional interpretation and application of statutes is favored, *Brooks, supra*, KRS 342.033 must be interpreted so as to protect the absolute right of cross-examination at the expense of the proponent.

II.

OBJECTIONS TO THE ADMISSIBILITY OF DR. AARON'S MEDICAL REPORT.

In addition to demanding its right to cross-examine Dr. Aaron as set forth above, Defendant objects to the admissibility of said report on the following specific grounds pursuant to 803 KAR 25:011, Section 13(8):

A. Admission of Dr. Aaron's Medical Report amounts to allowing the proponent to introduce unsworn medical testimony in violation of due process requirements and Board regulations. The regulations which permit a medical report to be filed do not require that the medical report be subscribed and sworn by the physician making the re-

port, but simply require that the report be signed. Thus, in essence, the regulations which allow a medical report to be filed on Form 107 allow the introduction of unsworn medical testimony. Allowing the introduction of unsworn medical testimony is in conflict with 803 KAR 25:011 Section 16(1), which requires that the rules of evidence which apply generally in the Commonwealth of Kentucky shall apply in workers' compensation cases. CR 43.04(1) states the general rule and requires that testimony given in a civil proceeding be under oath.

To allow unsworn medical testimony in the form of the Form 107 report is thus in conflict with one of the most basic requirements of evidence law—that testimony be given under oath or affirmation in order for the testimony to be competent. Accordingly, the regulations which allow the introduction of unsworn medical testimony deprive those persons against whom such evidence is introduced of due process of law.

B. The Form 107 omits important issues from inquiry, most notably issues relevant to the apportionment of liability between the Employer and the Special Fund.

C. The Form 107 elicits inadmissible medical opinions from the witness. Question No. 3 of Section F of the Form 107 asks the medical witness to express an opinion as to whether the Plaintiff's functional impairment will have an occupational implication greater than the functional impairment assessed. In essence, this section of the Form 107 asks the medical witness to express an opinion as to occupational disability. Kentucky's courts have held on numerous occasions that a medical examiner should evaluate the impairment of bodily function, and the evaluation of occupational disability is a legal or administrative task. As stated in *Congleton Brothers, Inc.* v. *Farmer*, Ky., 399 S.W.2d 722 (1966):

> We consider it appropriate to repeat the admonition given in *Kilgore* v. *Goose Creek Coal* Co. , Ky., 392 S.W.2d 78, that, while a medical examiner should evaluate the impairment of bodily function, it is a legal or administrative task to evaluate occupational disability.

Kentucky's highest court has stated that the medical expert should confine his testimony to medical matters. As stated in *Griffith* v. *Blair*, Ky., 430 S.W.2d 377 (1968):

> We agree with appellee Is contention that a medical expert may not usurp the function of the Board by giving testimony which, in the form of a medical opinion, expresses a legal conclusion.

The seminal case of *Osborne* v. *Johnson*, Ky., 432 S.W. 2d 800 (1968) , discusses the difference between functional impairment and occupational disability. Question No. 3 in Section F of the Form 107 clearly asks the medical witness to express an opinion as to occupational disability, thereby asking the medical witness to express an opinion upon matters concerning which the witness is not qualified as an expert.

Since the Form 107 elicits opinions which are violative of well-recognized evidentiary rules which apply in workers' compensation cases, we submit that the motion to submit the report of Dr. Aaron on said form should be overruled.

D. Under Section G of the Form 107 the witness is asked to assess the functional capacity of the Plaintiff. These questions are suggestive and do not allow the witness to express his or her own opinion. For example, there is no space provided in which the physician can indicate that the Plaintiff is able to lift 100 pounds or more. There is no space provided wherein the witness can, for example, express the opinion that the Plaintiff is able to lift 35 pounds or less.

The Form 107, rather than suggesting a list of responses from which the witness may choose, should simply solicit the witness's opinions.

E. In Question No. 2 of Section F of Form 107, it is suggested to the witness that the AMA Guidelines may not adequately assess the medical impairment of the Plaintiff. Rather than suggesting a response in this manner, the question should simply elicit the expert's opinion as to whether or not the AMA Guidelines adequately assess the

medical impairment of the claimant. If the doctor does not feel that the AMA Guides adequately assess medical impairment in any particular case, the doctor should he asked to explain why the AMA Guides are not adequate.

III.

MOTION TO PRODUCE PHYSICIAN FOR CROSS-EXAMINATION

Comes now the Defendant, by counsel, and for its Motion for an Order from the Administrative Law Judge directing the Plaintiff to produce Dr. Aaron for cross-examination at the Plaintiff's expense, states as follows:

1. The Defendant moves the Administrative Law Judge for an Order directing the Plaintiff to produce Dr. Aaron for cross-examination by the Defendant at the Plaintiff's expense, either by deposition or at the time of the hearing to be held in this case. In support of this motion, the Defendant incorporates herein by reference the authority cited herein in its "Demand of Right of Cross-Examination and objection to Admissibility of Medical Report," above.

WHEREFORE, Defendant prays that the Plaintiff's motion to file the medical report of Dr. Aaron as direct testimony be overruled or that, in the alternative, this Defendant's absolute right to cross-examine Dr. Aaron be recognized and that the Plaintiff be directed to arrange for the deposition of Dr. Aaron at the Plaintiff's expense, either by deposition or at the hearing, as a prerequisite to the consideration of Dr. Aaron's medical report as evidence.

Respectfully submitted this 2nd day of November, 1990.

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By: _____
JOY D. DENTON

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing were this ___ day of November, 1990, placed in the U. S. Mail addressed to the following:

Hon. Morris Butler
BUTLER, BUTLER & HUDSON
202 W. Court St., P.O. Box 280
Greensburg, KY 42743

Hon. Thomas A. Dockter
P.O. Box 3167
Louisville, KY 40201-3167

_____
JOY D. DENTON

KENTUCKY SUPREME COURT

File No. 92-CA-002648
(WC-89-000667)

UNION UNDERWEAR COMPANY, INC. d/b/a FRUIT OF THE LOOM (INCORRECTLY NAMED FRUIT OF THE LOOM, INC.) - - - - - - - *Appellant*

v.

MARY KAY SCEARCE and
THOMAS A. DOCKTER, Administrative Law Judge and
WORKERS' COMPENSATION BOARD - - - - *Appellees*

BRIEF ON BEHALF OF APPELLANT

This the 18th day of November, 1993.

HARNED, ANDERSON & BACHERT
324 East 10th St.
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Bowling Green, KY 42102-1270
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By: /s/ Joy D. Denton
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JOY D. DENTON

CERTIFICATION OF SERVICE

This is to certify that a true and correct copy of the foregoing was this 18th day of November, 1993, placed in the U.S. Mail addressed to the following: Hon. Morris Butler, 624 W. Main St., 4th Floor, Greensburg, KY 42743; Hon. Chris F. Gorman, Attorney General, State Capitol, Frankfort, KY 40601; Hon. Thomas A. Dockter, P. 0. Box 280, Louisville, KY 40201-3167; Hon. William A. Miller, Sr., 17 Floor, Kentucky Home Life Bldg., 239 S. 5th Street, Louisville, KY 40202-3269; Hon. W. T. Grant, Commissioner, Department of Workers' Compensation Board, Perimeter Park West, Bldg. C, 1270 Louisville Road, Frankfort, KY 40601.

By: /s/ Joy D. Denton
NORMAN E. HARNED
JOY D. DENTON

INTRODUCTION

In this Workers' Compensation case, two questions are presented. First, whether KRS 342.033 and the regulations of the Workers' Compensation Board, which allow a party to introduce unsworn statements of doctors into evidence, while placing on the opponent the burden of scheduling and paying for cross-examination of the witness, are invalid as a denial of constitutional due process. Second, whether the Kentucky Court of Appeals exceeded the applicable scope of review and erroneously applied the law in reversing a determination by the Workers' Compensation Board that the claimant did not sustain a work-related injury.

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STATEMENT OF THE CASE

The Appellee, Mary Kay Scearce [hereinafter "Scearce"], filed a workers' compensation claim for an injury she allegedly sustained while working for Union Underwear Co., Inc. d\b\a Fruit of the Loom [hereinafter "FOL"]. After Scearce filed her workers' compensation claim, a scheduling order was entered on September 5, 1990 by the Department of Workers, Claim setting a Pre-Hearing Conference on January 14, 1991. Commencing with the date of the scheduling order, all parties were allowed sixty (60) days in which to submit proof, thirty (30) days thereafter was allotted for the defendants to submit proof and fifteen (15) days thereafter for Scearce's rebuttal proof. On October 19, 1990 Scearce filed a Motion for Extension of time to and including November 30, 1990 in which to submit her proof. Said motion was sustained by the Administrative Law Judge [hereinafter "ALJ"] and Scearce's proof time was extended to November 30, 1990. At the same time, FOL's proof time was extended to December 30, 1990.

KRS 342.033 and 803 KAR 25:011 § 13 allows a party, in a workers' compensation case, to introduce direct testimony or proof from a physician by filing a written medical report from said physician. The physician's report may be introduced by submitting the same on a Form 107 report. A Form 107 report is simply a form adopted by the Workers' Compensation Board [hereinafter "Board"] which allows a physician to state his opinions by answering certain questions as enumerated on the form.[1] Although both the statute and the regulations provide that the opponent of the evidence may cross-examine the witness, neither KRS 342.033 nor 803 KAR 25:011 § 13 addresses the question of which party shall pay the deposition fee of the physician in connection with the cross-examination or which party has the burden of scheduling the cross-examination of that

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[1]The Regulations also allow the filing of "other medical reports" not on a Form 107, however, none were submitted in this case.

physician. In this case that burden was placed upon the opponent of the evidence.

The medical proof submitted by Scearce, in her case in chief, consisted of the Form 107 Reports of Dr. Aaron, Dr. DeSimone and Dr. Reddy. Scearce filed the Form 107 report of Dr. Aaron on October 31,1990. In response, FOL filed an objection to the filing of Dr. Aaron's report and requested that Scearce be required to produce Dr. Aaron for cross-examination by FOL at the expense of Scearce, either by deposition or at the time of the final hearing. FOL's motion was overruled by the ALJ.

On November 20, 1990 Scearce filed the Form 107 report of Dr. Reddy and on November 21, 1990 she filed the Form 107 report of Dr. DeSimone. FOL filed its objection to the filing of the Form 107 reports of Dr. Reddy and Dr. DeSimone on November 28, 1993 and requested that Scearce be required to produce Dr. Reddy and Dr. DeSimone for cross-examination by FOL at the expense of Scearce, either by deposition or at the time of the final hearing. FOL's motion was overruled by the ALJ.

After the completion of FOL's proof, the case was submitted for decision by the ALJ. The ALJ rendered an Opinion in favor of Scearce and FOL appealed to the Board. By Opinion entered October 2, 1992, the Board ordered the dismissal of Scearce's claim, finding no evidence of work-relatedness. On September 24, 1993, the Kentucky Court of Appeals reversed the Board; the Court of Appeals determined that there was sufficient evidence to support a finding that Scearce sustained a work-related injury. The Court of Appeals further overruled FOL's objection to the admissibility of the Form 107 reports of Dr. Kenneth DeSimone, Dr. Phil Aaron and Dr. Narasimha Reddy which were submitted by Scearce as direct medical testimony.

The questions presented to the Court herein are questions of first impression.

ARGUMENTS

I.

KRS 342.033 AND THE ADMINISTRATIVE REGULATIONS OF THE WORKERS' COMPENSATION BOARD WHICH ALLOW A PARTY TO ADMIT INTO EVIDENCE UNSWORN STATEMENTS OF DOCTORS WHILE PLACING THE BURDEN OF CROSS-EXAMINING THE WITNESS ON THE OPPONENT OF THE EVIDENCE ARE INVALID AS A DENIAL OF CONSTITUTIONAL DUE PROCESS.

In this argument we will explore the following propositions. Due process requires that when a Form 107 report of a medical witness is introduced as direct evidence in a workers' compensation case that the medical witness be produced for cross-examination and that the burden of producing and paying for the witness must be borne by the proponent of the evidence. Further, the procedure allowing the use of Form 107 reports as applied in this case is defective in several respects: 1) the procedure allows the introduction of unsworn testimony; 2) the Form 107 reports elicits incompetent and inadmissible opinions from the medical witness; 3) the Form 107 is overly suggestive and goes beyond merely soliciting the opinions of the witness.

A. FOL has an absolute right to cross-examine Drs. DeSimone, Aaron and Reddy and the burden of scheduling and paying for such cross-examination rests upon Scearce.

Both the statute which allows the introduction of proof by way of medical reports, KRS 342.033, and the regulation promulgated pursuant to that statute, 803 KAR 25:011 § 13, recognize that the opponent of such evidence has the right to cross-examine the witness by deposition if desired. As we point out below, such a right is a necessary element of due process. The statute and the regulation are silent, however, with respect to which party should bear the burden of scheduling and paying the costs associated with allowing for the exercise of that fundamental right. In this

case the ALJ imposed the burden of exercising the fundamental right of cross examination upon the opponent of the evidence. Such a practice not only goes beyond the statute and the regulation, but also violates the Constitutional requirement that parties be afforded due process of law as provided in the Fourteenth Amendment to the Constitution of the United States and § 2 of the Kentucky Constitution. (The Attorney General was notified that FOL is asserting a constitutional challenge in this case by Notice to the Attorney General filed herein on November 23, 1990).

If the Form 107 reports of Drs. DeSimone, Aaron and Reddy are to be admitted as direct evidence by Scearce, FOL has a right to cross-examine those doctors and the burden of producing the witness and paying for that cross examination must rest upon Scearce.

A long line of Kentucky cases, including *Brooks* v. *Island Creek Coal Company*, Ky.App., 678 S.W.2d 791 (1984), hold that the Workers' Compensation Act should be interpreted in a manner which will render it constitutional rather than unconstitutional. Thus, if the constitutional guarantee of due process would require that before the medical reports of Drs. DeSimone, Aaron and Reddy may be considered as evidence FOL must be provided an absolute right to cross-examine Drs. DeSimone, Aaron and Reddy at the expense of Scearce, then the Act should be so interpreted and applied.

It is well established in Kentucky law that the right of cross-examination is a fundamental adjunct of due process and must be provided in administrative proceedings which are adversarial in nature. *Kaelin* v. *City of Louisville*, Ky., 643 S.W.2d 590 (1982). *Black Mountain Corporation* v. *Williams*, Ky., 193 S.W.2d 416 (1946) holds that evidence produced in workers' compensation proceedings must be in a form authorized by customary legal procedures.

The appellate courts of other states, as well, have recognized that while the evidentiary rules in an administrative proceeding may be relaxed, they cannot be relaxed to

the point of dispensing with the right of cross-examination which is fundamental in Anglo Saxon law. *Employers Commercial Union Insurance Group* v. *Schoen*, Alaska, 519 P.2d 819 (1974). In fact, the United States Supreme Court has recognized that the right to cross-examine an adverse party in administrative proceedings is constitutionally protected. *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Likewise, the Supreme Court of Montana, in *Hert v. J. J. Newberry Company*, Mont., 587 P.2d 11 (1978), held that every party to a workers, compensation proceeding has an absolute right to cross-examine adverse witnesses as part of the due process requirements imposed in those proceedings.

Given that there is an absolute right to cross-examine adverse witnesses in workers' compensation cases, the question which next arises in connection with medical reports such as those of Drs. DeSimone, Aaron and Reddy is: who is to bear the responsibility of producing the witnesses (by scheduling the witness' deposition or arranging for the witness' attendance at the hearing) and defraying the expenses incurred in providing the opportunity to cross-examine. Although there is no guiding authority responsive to this question in the jurisprudence of Kentucky, other states have had the opportunity to examine the question under similar circumstances and statutes, and have determined that the *proponent* of the medical report must make the author of the report available for cross-examination and must bear the expense of providing the opportunity of cross-examination to the adverse party. In *Hert* v. *J. J. Newberry Company, supra*, the Supreme Court of Montana stated:

> Thus, it is the duty of any party before the Workers' Compensation Court whether he be worker, employer or carrier, if that party intends to rely on the medical evidence in a written medical report, to present the medical person or expert who is the author of the same for cross-examination either by deposition or by testimony at the hearing.

Hert v. *J.J. Newberry Company*, 587 P.2d at 13.

In *Hanna* v. *McGrew Bros. Sawmill, Inc.*, Or. App., 605 P.2d 724 (1980), one party, EBI, offered as evidence the written medical report of Dr. Weinman pursuant to the workers' compensation statute. The opposing party, Argonaut, made arrangements for the doctor to appear at the hearing for purposes of cross-examination. The referee ruled that Argonaut was required to pay the fees and expenses of the doctor to appear so that Argonaut could cross-examine the doctor. *Id.*, at 727. The Oregon Court of Appeals disagreed. The Court held that Dr. Weinman was presented on behalf of EBI and he was EBI's witness. Although the workers' compensation statute allows the introduction of medical testimony in the form of a report, it does not negate the fundamental right to cross-examination. As the Court stated,

> The procedure of offering medical testimony through the medium of written reports does not alter the status of the witness when he is called for the purposes of cross-examination. He still remains the witness of the party offering the medical reports and that party is responsible for paying the fees and expenses incident to his appearance as a witness for cross-examination.

Hanna v. *McGrew Bros. Sawmill,* Inc., 605 P.2d at 728. Again, the Rhode Island Supreme Court, in *Drake Bakeries, Inc.* v. *Butler,* R.I., 178 A.2d 295, 299 (1962), states:

> The proceedings under the Workmen's Compensation Act are necessarily adverse in nature, and the parties are free to produce such evidence and testimony as they deem essential to the interest of their respective causes. The cost of producing such evidence or testimony properly falls on the producing party.

The workers' compensation system in Alaska is designed such that it operates much the same way as the procedure in Kentucky. In Alaska, the Board's rules favor the production of medical evidence in the form of written reports. The rules also designate the proper contents of the medical reports and require that the original signed report be filed with the Board. In order to be admitted as evidence, the

written medical report must be filed with the Board and served on the opposing party at least ten (10) days prior to the hearing. *Employer Commercial Union Ins. Group* v. *Schoen, supra.* According to the Court, this procedure does not, even arguably, substitute for the right of cross-examination. *Id.*, at 822. When further exploring this system, the Court held that the better reasoned authority is that the right of cross-examination does not carry a price tag. *Commercial Union Companies* v. *Smallwood,* Alaska, 550 P.2d 1261 (1976). In *Smallwood,* the Court held that the plaintiff could present his medical evidence in the form of medical reports, however, he could not do so by attaching a financial precondition to the opposing party's right of cross-examination.

Likewise, Rhode Island requires the party offering a medical report as evidence in a workers, compensation proceeding to produce the physician for cross-examination by the other party. *Natalizia* v *Atlantic Tubing & Rubber Co.,* R.I., 105 A.2d 190 (1954). In *Natalizia,* the opposing party failed to preserve the issue of his right to cross-examination of the physician-author, Dr. Thompson, of the medical report submitted by the plaintiff. According to the Court,

> This whole question would present an entirely different aspect if the record disclosed that respondent had been deprived of the right to cross-examine Dr. Thompson on the matters contained in his report *or if the opportunity was afforded it only at its own expenses.* (emphasis added).

105 A.2d at 193.

The Court further held that a medical report may be admitted as evidence *only* on the condition that the offering party produce the author of the report if the opposing party makes known its desire to cross-examine the physician. *Id.*

The appellate courts of many other states have rendered similar decisions. However, in order to avoid unnecessarily lengthening this Brief, we will simply cite some of

the appellate decisions of other states which recognize that it is the duty of the proponent of a medical report to produce the author of the report for cross-examination and to defray the expenses incurred in connection with such cross-examination. These cases include: *Chavez* v. *Industrial Commission*, Ariz., 425 P.2d 864 (1967); *Doss* v. *American Ventures, Inc.*, La., 224 So.2d 470 (1969) ; *Chambers v. Bigelow-Liptak Corp.*, Ark., 344 S.W.2d 588 (1961) ; and *Froysland* v. *N.D. Workers' Comp. Bureau*, N.D., 432 N.W.2d 883 (1988).

The fact that requiring Scearce in the instant case to produce Drs. DeSimone, Aaron and Reddy for cross-examination will cause Scearce to incur additional monetary expense has been held an insufficient basis to dispose of the requirement that the proponent of evidence produce the witness for cross-examination. As stated by the Superior Court of New Jersey in *Paco* v. *American Leather Mfg-Co.*, N.J. Super., 516 A.2d 623, 627 (1986):

> The high cost of producing medical testimony, although a heavy burden for the injured employee to bear in some instances, simply cannot justify the trammeling of fundamental rights in a contested formal proceeding.

In *Jones* v. *Industrial Commission*, Ariz.App., 401 P.2d 172 (1965), the Industrial Commission argued that the requirement of the opportunity to cross-examine witnesses was satisfied since the opposing party had a right to call witnesses for the purposes of cross-examination. The Arizona Court of Appeals disagreed and held,

> The party entitled to the right or "opportunity" for cross-examination should not be compelled to expend money or effort in obtaining that "opportunity".

401 P.2d at 176.

We would note, further, that if KRS 342.033 were applied in such a manner as to allow the Workers' Compensation Board to adopt regulations which do not protect the absolute right of an adversary to cross-examine the proponent's witnesses at the expense of the proponent, then

KRS 342.033 would violate the well-recognized prohibition against the delegation of legislative authority in the absence of standards or safeguards governing the exercise of such authority. See *Miller* v. *Covington Development Authority*, Ky. , 539 S.W.2d 1 (1976), and *Butler* v. *United Cerebral Palsy of Northern Kentucky, Inc.*, Ky., 352 S.W.2d 203 (1961). KRS 342.033, on its face, contains absolutely no standards or safeguards to govern the Board in promulgating regulations concerning the use of written medical reports as direct testimony. Unless the safeguard of an absolute right of cross-examination at the proponent's expense is implied in the statute, or in the regulations, then the statute and/or the regulation is violative of the rule recognized in *Miller* and *Butler* and is unconstitutionally vague. Once again, since a constitutional interpretation and application of statutes is favored, KRS 342.033 must be interpreted so as to protect the absolute right of cross-examination at the expense of the proponent. To hold otherwise creates a system that is tantamount to the denial of the Appellant's due process rights.

As the present workers' compensation system is designed, the proponent can simply wait until the last day of its allowed proof time and file one or more Form 107 reports of the doctors of its choosing. The opponent is then in the position of having to attempt to schedule the deposition of another party's witnesses if the opponent desires to cross-examine those witnesses. In view of the time constraints imposed by the scheduling of proof in workers' compensation cases, this is sometimes simply not realistic. Many times such a time frame is simply unworkable. As the system presently operates, a party can file a Form 107 report of any medical doctor, secure in the knowledge that the witness, opinions will not be required to withstand the scrutiny of cross-examination by the opposing party since the opposing party has such a short time frame in which to conduct such a deposition and is placed in the position of either paying a fee established by the medical witness already unhappy at the prospect of being cross-examined by

his patient's opponent or subpoenaing (and thus antagonizing) the witness. The present system does not encourage the parties to seek the truth, but instead encourages gamesmanship; it encourages the parties to find the doctor who will support their position and to submit a report of that doctor as late as possible so as to minimize the likelihood of cross-examination of the witness.

The present system is fundamentally unfair in that it requires one party to pay for the opportunity to question the opposing party's witnesses when a Form 107 is introduced. In the present case, although Scearce has the burden of proof, FOL would be required to expend its own money in order to cross-examine Scearce's witnesses.[2] The right of cross-examination is a fundamental right and not simply an evidentiary rule. *Paco* v. *American Leather Mfg. Co., supra.* The regulations as they are currently administered (as well as the statute if so interpreted) unconstitutionally restrict the fundamental right of cross-examination and thereby offend due process. Further, this is an issue which could potentially arise in every workers, compensation case and hence is of significant importance. The Court should address this issue in order to give the Board, the ALJ's and practitioners guidance on the issue of the extent of the opponent's right to cross-examination when a Form 107 report is introduced.

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[2]The procedure followed by the Board in this and other cases is subject to the same condemnation which would allow a party to take and file an *ex parte* deposition of a medical witness and would require the opponent desiring to cross-examine the witness to obtain an agreeable date (within the short time frames described above) from the witness and pay for the privilege of conducting cross-examination. At least under this scenario the direct testimony would be under oath, which is not the case with Form 107 medical reports.

B. The procedure embodied in 803 KAR 25:011 § 13 and the Form 107 promulgated thereunder is invalid.

In this section of the brief we shall examine the various reasons why the procedures adopted by the Board for the introduction of medical reports are invalid.

1. The opponent of a Form 107 medical report is deprived of substantive due process of law by the regulations which allow the introduction into evidence of unsigned and unsworn writings.

The admission of Drs. DeSimone, Aaron and Reddy's medical reports in the manner as was done in this case amounts to allowing a party to introduce unsworn medical testimony in violation of due process requirements. The regulations which permit a medical report to be filed do not require that the medical report be subscribed and sworn by the physician making the report, and in fact allow an *unsigned* report, office note or letter to be introduced based on the affidavit of the proponent's counsel. 803 KAR 25:011 § 13(3). Thus, in essence, the regulations which allow a medical report to be filed allow the introduction of unsworn medical testimony. CR 43.04(l) requires that testimony in a civil case be given under oath. This requirement is of such a basic nature as to be imposed by principles of substantive due process. In addition to the recognition of the basic nature of the requirement that testimony be under oath contained in CR 43.04, the courts have recognized the most basic nature of the "oath or affirmation" requirement in their published opinions.

For example, the Court in *Georgia-Pac. Corp.* v. *McLaurin*, Miss., 370 So.2d 1359 (1979), specifically addressed the introduction of ex parte, unsworn statements of physicians as evidence in workers' compensation proceedings. As the Court pointed out, in workers' compensation cases the testimony of the doctor concerning his medical findings "is the sine qua non to recovery" for the plaintiff. "It is an understatement to say that this testimony is important". *Id.*, at 1362. As the Court further stated,

> While doctors occupy an important role in our scheme of things, they are, after all merely human, and may not be considered wholly free from the frailties that beset the rest of us. There is nothing, therefore, in the fact that a witness may be a member of the medical profession that reasonably may be said to justify his exemption from the requirements and restrictions which would apply to others giving testimony as witnesses in an adversary proceeding.

370 So.2d at 1362.

To allow unsworn medical testimony is thus in conflict with one of the most basic requirements of evidence law — that testimony be given under oath or affirmation in order for the testimony to be considered competent. Accordingly, the regulations which allow the introduction of unsworn medical testimony deprive, those persons against whom such evidence is introduced of substantive due process of law in violation of both the Kentucky and United States Constitutions.

2. The Form 107 elicits inadmissible opinions from the witness.

The Form 107 elicits inadmissible medical opinions from the medical witness. Question No. 6 of Section F of the Form 107 asks the medical witness to express an opinion as to whether the claimant's functional impairment will have an occupational implication greater than the functional impairment assessed. In essence, this section of the Form 107 asks the medical witness to express an opinion as to the extent of occupational disability. Kentucky's courts have held on numerous occasions that a medical examiner should evaluate the impairment of bodily function, and that the evaluation of occupational disability is a legal or administrative task. As stated in *Congleton Brothers, Inc.* v. *Farmer*, Ky., 399 S.W.2d 722, 723 (1966),

> We consider it appropriate to repeat the admonition given in *Kilgore* v. *Goose Creek Coal Co.*, Ky., 392 S.W.2d 78, that, while a medical examiner should evaluate the impairment of bodily function, it is a

> legal or administrative task to evaluate occupational disability.

Kentucky's highest court has stated that the medical expert should confine his testimony to medical matters. As stated in *Griffith* v. *Blair*, Ky., 430 S.W.2d 337, 339 (1968):

> We agree with appellee's contention that a medical expert may not usurp the function of the Board by giving testimony which, in the form of a medical opinion, expresses a legal conclusion.

The seminal case *of Osborne* v. *Johnson*, Ky., 432 S.W.2d 800 (1968.), discusses the difference between functional impairment and occupational disability. Question No. 6 in Section F of the Form 107 clearly asks the medical witness to express an opinion as to occupational disability, thereby asking the medical witness to express an opinion upon matters concerning which the witness is not qualified as an expert.

Since the Form 107 elicits opinions which are violative of well-recognized evidentiary rules which apply in workers, compensation cases, we submit that the motion to submit the reports of Drs. DeSimone, Aaron and Reddy on said form should have been overruled and that any opinion rendered by this Court in deciding this case should declare the regulations set forth at 803 KAR 25:011 § 13 invalid.

3. The Form 107 is overly suggestive, rather than allowing the medical witness to express an opinion on relevant matters.

Under Section G of the Form 107 the witness is asked to assess the functional capacity of the claimant. These questions are suggestive and do not allow the witness to express his or her own opinion. For example, there is no space provided in which the physician can indicate that the claimant is able to lift 100 pounds or more. There is no space provided wherein the witness can, for example, express the opinion that the Plaintiff is able to lift 35 pounds or less. The Form 107, rather than suggesting a list of responses from which the witness may choose, should simply solicit the witness's opinions.

In addition, in Question No. 2 of Section F of Form 107, it is suggested to the witness that the AMA Guidelines may not adequately assess the medical impairment of the claimant. Rather than suggesting a response in this manner, the form should simply elicit the expert's opinion as to whether or not the AMA Guidelines adequately assess the medical impairment of the claimant. If the witness does not feel that the AMA Guides adequately assess medical impairment in any particular case, the witness should be asked to explain *why* the AMA Guides are not adequate.

II.

THE KENTUCKY COURT OF APPEALS ERRED WHEN IT FOUND THAT THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT SCEARCE SUSTAINED A WORK-RELATED INJURY.

The error of the Court of Appeals stems from three (3) sources. First, the Court below employed an inapplicable standard of proof in order to reach a determination of work-relatedness. The Court of Appeals applied to this case the "totality of circumstances" test (a more liberal than usual test of work relatedness) which, this Court has clearly held, applies only to a limited class of cases — heart attack cases. Second, the Court of Appeals exceeded the applicable scope of review as set forth in *Western Baptist Hospital* v. *Kelly*, Ky., 827 S.W.2d 685 (1992), inasmuch as the Court of Appeals substituted its judgment for that of the Board rather than limiting its review in conformity with *Kelly*. Finally, even if the Court of Appeals were authorized to engage in a de novo evaluation of the evidence, an evaluation of the evidence reveals that there is *no* testimony which would support a finding that the alleged injury is work-related; therefore, the Board was correct in its determination.

A. Application of the "totality of the circumstances" test to this case was error.

In order that a workers' compensation claimant may be entitled to benefits, it must, of course, be established that

the injury which is alleged is work-related or, stated another way, that the work caused the injury. Generally, Kentucky case law requires that work-relatedness or causation be proved within reasonable medical probability. *Markwell & Hartz, Inc.* v. *Pigman*, Ky., 473 S.W.2d 842 (1971); *Young* v. *L. A. Davidson, Inc.*, Ky., 463 S.W.2d 924 (1971). The Courts have, however, carved out a limited exception to the general rule that causation be established within reasonable medical probability. The Court of Appeals applied this exception to the instant case.

The Court of Appeals relied upon *Hudson v. Owens*, Ky., 439 S.W.2d 565 (1969), and applied the "totality of the circumstances" test in evaluating whether adequate proof of causation has been introduced in the present case. The Court below relied upon the "totality of circumstances standard" because, according to the Court of Appeals, "In the case at bar, the medical evidence connecting Scearce's employment to her disability is tenuous." (Opinion of the Kentucky Court of Appeals, rendered September 24, 1993, p. 4). Since the tenuous nature of the proof would not achieve the desired result of finding the claim compensable, the Court of Appeals applied a standard of proof which would allow a finding that the claim is compensable. In so doing the Court of Appeals erred.

Application of the *Hudson* standard of proof is clearly erroneous. *Hudson* was a case wherein the employee died from a *heart attack* and claimed workers' compensation as a result thereof. In *Moore* v. *Square D*, Ky., 518 S.W.2d 781 (1974), the Court discussed *Hudson's* "totality of the circumstances" test for determining causation in cases involving heart attacks. In discussing this test, the Court recognized that heart attack cases fall into a separate category inasmuch as the medical cause of heart attacks is rarely susceptible of proof within the realm of probability. Accordingly, the Court adopted a more lenient standard of proof in this limited class of cases. The same standard does not apply in workers' compensation cases that *do not* involve heart attacks, however. As the Court held in *Moore*,

> But we think the real distinction lies in the fact that heart attack cases fall into a *special class* of their own, to which, historically and necessarily, *special rules* have been applied. (emphasis added).

518 S.W.2d at 784.

One of the "special rules" which applies *only* to this "special class" of cases is the "totality of the circumstances" test of causation.

Because the Court of Appeals applied the "totality of the circumstances" standard, the Court erroneously determined that the admittedly "tenuous" evidence introduced concerning causation required reversal of the Board's dismissal of the claim. As we shall discuss below, when the evidence is viewed in light of the appropriate standard of proof—reasonable medical probability—it is clear that the record is actually *devoid* of proof of causation within reasonable medical probability and that the decision of the Board must be affirmed on this issue.

B. The Court of Appeals exceeded the permissible scope of review in reversing the Board.

Pursuant to *Western Baptist Hospital* v. *Kelly, supra*, the Court of Appeals, in reviewing a decision of the Board, is limited as to the scope of review which may be undertaken. According to this Court in *Kelly*,

> The function of further review of the WCB in the Court of Appeals is to correct the Board *only* where the Court perceives the Board has *overlooked or misconstrued controlling statutes or precedent*, or committed an error *in assessing the evidence so flagrant as to cause gross injustice.* (emphasis added).

827 S.W.2d at 687-88.

An examination of the opinion of the Court of Appeals in this case will reveal that the Court clearly exceeded the permissible scope of review.

We first consider whether the Board overlooked or misconstrued controlling statutes or precedent. There is no statement or finding in the opinion rendered by the Court

below to the effect that statutes or precedent were overlooked or misconstrued by the Board. Thus, reversal on the causation issue was not warranted on this ground. Additionally, it is clear from the above analysis of *Hudson* v. *Owens* and *Moore* v. *Square D* that it was the Court of Appeals, not the Board, which misconstrued precedent by, applying the "totality of the circumstances" test to a non-heart attack case in plain contravention of the express language of *Moore*. Thus, once again, reversal on the causation issue was not warranted based on an alleged oversight or misinterpretation with respect to controlling law.

The only other ground upon which the Court of Appeals is authorized to reverse the Board's determination that Scearce failed to prove causation is that the Board committed an error in assessing the evidence that is so flagrant as to cause a gross injustice. There is no finding by the Court of Appeals that such an error was committed; thus, it is clear that the appropriate scope of review was exceeded. In fact, it is clear that the Court of Appeals simply engaged in a *de novo* review of the record. The essence of the decision below with regard to the causation issue is set forth in the sentence found on page four (4) which states, "We believe the evidence when viewed as a whole, however, is nevertheless sufficient to establish the necessary causal nexus." A clearer indication that the Court of Appeals simply engaged in a *de novo* review of the Board's decision and substituted its judgement for that of the Board is difficult to imagine.

Had the Court of Appeals properly restricted the scope of review in this case it is clear that the Board's decision on the causation issue would have been affirmed. Clearly, the Board did not overlook or misconstrue applicable law. Furthermore, since the view of the record taken by the Board is, as we shall see below, the proper view, there was no flagrant error in assessing the evidence which resulted

in gross injustice insofar as the Board's determination on the causation issue is concerned.[3]

C. Even if the Court of Appeals utilized the proper scope of review, there is no evidence which would support a finding that Scearce's alleged injury is work-related.

The only medical proof submitted by Scearce was through the use of multiple Form 107 medical reports. The simple fact of the matter is that the Form 107 does not address the issue of causation. There are simply no questions on the Form 107 reports submitted by the Appellee which inquire as to causation. Therefore, it is apparent that no medical proof on the issue of causation was submitted. Anticipating that Scearce will maker the same arguments before this Court as were presented below, we will proceed to address those arguments at this point.

Scearce would blame the Board for allowing the filing of a medical report which does not provide any specific questions nor space for an answer as to any opinion respecting medical causation. (See Appellee's Petition for Review to the Kentucky Court of Appeals, pp. 3, 11). However, it is the claimant who has the burden of proof, not the Board. *Snawder* v. *Stice*, Ky.App., 576 S.W.2d 276 (1979); *Kentland-Elkhorn Coal Co.* v. *Johnson*, Ky. App., 549 S.W.2d 308 (1977); *Young* v. *Burgett*, Ky., 483 S.W.2d 450 (1972). Therefore, it was the responsibility of Scearce to provide the necessary medical proof on the causation issue. As to Scearce's argument that the Form 107 report does not provide enough room for an opinion of the physician as to work-relatedness, we would simply point out

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[3]We are aware that this Court, in *Kelly*, similarly limited its review of the Court of Appeals, decisions. We believe, however that this limitation assumes that the Court of Appeals appropriately limited its review, and that this Court will review and reverse a decision by the Court of Appeals which results from review which is broader than authorized.

that each of the physicians was free to attach additional pages to the Form 107, as Dr. DeSimone actually did in this case. Therefore, Scearce's argument that she did not have enough space on the Form 107 report to meet her burden of proof as to causation is not well taken.

We turn now to an examination of the proof which was introduced by the parties. It is well settled that the *possibility* of a casual connection is not enough to prove such a connection as a fact. *Markwell & Hartz, Inc.* v. *Pigman, supra; Young* v. *L. A. Davidson, Inc.*, Ky., *supra.* Scearce submitted the Form 107 report of Dr. Phil Aaron. Dr. Aaron states that the Appellee has problems with her neck, shoulders, arms and wrists which creates a 27% whole body impairment. However, at no point in his report does Dr. Aaron identify the source of this impairment. Scearce also submitted the Form 107 report of Dr. Kenneth DeSimone. Again, Dr. DeSimone does *not address* the issue of causation. Lastly, Scearce submitted the Form 107 report of Dr. Narasimha Reddy. Although she has made no claim as to any work-related injury concerning her knee, the majority of Dr. Reddy's Form 107 report addresses an arthroscopic surgery he performed on Scearce's knee in September, 1990. In any event, Dr. Reddy *does not address* the issue of causation as to any of the claimant's current alleged symptoms. Scearce argued below that simply because Dr. Reddy diagnosed carpal tunnel syndrome and noted that the symptoms occurred while Ms. Scearce was on the job, that Dr. Reddy's testimony constitutes a finding of work relatedness. Simply because a claimant's symptoms arise at work does not establish that those symptoms are caused by the claimant's work, however. Carpal tunnel syndrome may be caused by non-work related conditions, such as an automobile accident. Once the syndrome exists, symptoms may arise during work activity just as they may arise during other activity. Under this scenario, however, it would not be seriously contended that the condition is work-related. Because Dr. Reddy's report is just as consistent with a non-work related scenario as

with a work related scenario, and because Scearce has the burden of proof, Dr. Reddy's report cannot constitute the required medical testimony establishing causation within reasonable medical probability. There must be some medical testimony to establish the causation link between the symptoms and the work.

In contrast to the medical proof submitted by Scearce, FOL submitted medical proof from two qualified Board Certified physicians. Scearce contends that the testimony of these physicians discharges her burden. An examination of the record belies this contention. We turn first to the testimony of Dr. Morton Kasdan. According to Scearce, Dr. Kasdan's findings on examination of a positive Phalen's test, which indicates numbness, tingling and compression at the Appellee's wrist, combined with Dr. Kasdan's expectation that Scearce would have problems with a return to work requiring rapid repetitive use of the upper extremity, supports a finding of a work-related injury. Logic dispels this contention, however.

Although Dr. Kasdan did testify that he would expect Scearce to have problems with a return to rapid repetitive work, he explained that this conclusion was based upon his impression that Scearce simply did not want to go back to work. (Kasdan depo., P. 13). Clearly, Scearce's ability or inability to perform rapid repetitive work by no means addresses the issue of work-relatedness or causation. As with the testimony of Dr. Reddy, considered above, the testimony of Dr. Kasdan is just as consistent with a non-work related condition as with a work related condition and cannot, therefore constitute medical opinion establishing causation within reasonable medical probability.

Scearce completely ignores the remaining testimony of Dr. Kasdan wherein he clearly and unequivocally states that Scearce's present problems are not work-related. (Kasdan depo., p. 9).

Scearce, in her arguments below, has placed much emphasis on the fact that Dr. Kasdan did diagnose a "cumu-

lative fatigue disorder" and that Dr. Kasdan opined that the Appellee's job description was "compatible" with the history one *might* obtain from a patient with overuse syndrome of the upper extremities. Once again, this testimony is just as consistent, standing alone, with non-work relatedness as with work relatedness. Simply because Dr. Kasdan diagnosed "cumulative fatigue disorder" does not provide testimony, within reasonable medical probability, that Scearce's cumulative fatigue disorder is work-related. Furthermore, simply because Dr. Kasdan opined that the job description which he obtained from Scearce *might* be compatible with the history that one *might* obtain from a patient with overuse syndrome of the upper extremities does not establish work-relatedness with respect to this particular claimant in this particular case. To attempt to interpret Dr. Kasdan's testimony to establish causation in this case is totally disingenuous and, if engaged in by a fact finder, would constitute a clear abuse of discretion. We trust the Court to provide a fair reading of the deposition of Dr. Kasdan.

FOL also submitted the testimony of Dr. Dennis O'Keefe, a Board Certified neurologist. It was Dr. O'Keefe's testimony that Scearce's history is not consistent with a work-related injury since she has been off work since September 6, 1989, and has continued to have complaints of pain with no improvement. (O'Keefe depo., pp- 5, 9).

FOL also submitted the Form 107 report of Dr. Stanley Collis. (No objection or demand of right of cross-examination was filed by Scearce concerning the Form 107 report of Dr. Collis.) Dr. Collis suggested that Scearce should return to work and specifically opined that she has no work-related problems. (Collis Form 107). In proceedings below, Scearce attempted to argue that simply because Dr. Collis reported (by way of history received from Scearce) that Scearce, herself, related her symptoms to her work, causation is established. Scearce confuses Dr. Collis, documentation of Scearce's history, including Scearce's opinion as to the cause of her problems, with an expression of

opinion by Dr. Collis. Such an argument speaks more eloquently than can this writer of the weakness of Scearce's position.

Having examined the medical testimony in this case, we submit that the present case is not unlike the *Markwell, supra,* case wherein the claimed injury was deafness. In that case, the only evidence introduced that the claimant's sudden onset of deafness was related to his operation of a jackhammer for his employer, was the claimant's own testimony. The medical testimony did not support the claimant's allegation of a work-related injury. In the present case, the only testimony that Scearce's present problems, if any, are related to her work at Fruit of the Loom is her own. testimony. This is not a case of Scearce being shot in the head or suffering some equally obvious injury as described by the Court in *Markwell.* In fact, there is quite a bit of controversy in the medical field concerning the cause of carpal tunnel syndrome according to Dr. O'Keefe (O'Keefe depo. p. 19). No one can look at Scearce and determine that she is injured in any manner. There is no gun shot wound or other obvious injury that would create an inference that Scearce was injured during the course of her employment at Fruit of the Loom.

In order to establish that she sustained a work-related injury in such a case, the claimant must, according to the Court in *Markwell,* introduce competent medical testimony; as we have seen above, in this case there is none. In fact, the medical testimony of Dr. Kasdan and Dr. O'Keefe that the Appellee's present condition is not work-related is uncontradicted. As such, the uncontradicted opinion evidence from the medical expert cannot be summarily set aside by the trier of fact. *Mengel* v. *Hawaiian-Tropic Northwest and Central Distributors, Inc.,* Ky.App., 618 S.W.2d 184 (1981).

CONCLUSION

Fruit of the Loom respectfully requests that the Court reverse the Court of Appeals and that this case be re-

manded to the Administrative Law Judge for entry of an order of dismissal inasmuch as there is no medical proof of causation within reasonable medical probability. In addition, Fruit of the Loom respectfully requests that the Court's Opinion herein hold that the Administrative Law Judge improperly admitted into evidence the Form 107 reports of Drs. DeSimone, Aaron and Reddy when he did so without requiring Scearce to produce said physicians for cross-examination by Fruit of the Loom with the burden of scheduling and paying for said depositions to be borne by Scearce. Finally, we respectfully request that the Court, in its Opinion, declare that the Board regulations which allow the introduction into evidence of unsworn and unsigned documents are invalid as a violation of FOL's constitutional due process rights.

This 18th day of November, 1993.

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By: /s/ Joy D. Denton
Norman E. Harned
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APPENDIX

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS

Claim No. 89-00667

MARY KAY SCEARCE - - - - - - - - *Plaintiff*

v.

FRUIT OF THE LOOM and
SPECIAL FUND - - - - - - - - - *Defendants*

OPINION, AWARD AND ORDER

ORIGINAL TO DEPARTMENT OF WORKERS' CLAIMS
Hon. Morris Butler
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Greensburg, KY 42743
ATTORNEY FOR PLAINTIFF

Hon. Joy Denton
P.O. Box 1270
Bowling Green, KY 42102
ATTORNEY FOR DEFENDANT

Hon. Kenneth J. Costelle
620 South Third St.
Louisville, KY 40202
ATTORNEY FOR SPECIAL FUND

FINDINGS OF FACT

1. The parties agreed to the following stipulations at the Pre-Hearing Conference: coverage; employment relationship; alleged work-related injury on February 22, 1988; due-and timely notice of alleged injury; temporary total disability benefits paid at the rate of $281.60 per week from November 29, 1988 through June 12, 1990 for a total

of $17,620.64; medical expenses paid in the amount $5,692.78; Plaintiff returned to work for various periods to be discussed at Hearing; date of birth January 8, 1950; eighth grade education; and no specialized or vocational training.

The remaining contested issues after the Pre-Hearing Conference were: average weekly wage; extent and duration of disability; and causation.

Upon oral motion, the Special Fund was dismissed as a Party-Defendant.

At the Hearing, Plaintiff's average weekly wage was stipulated to be $406.86. Specific periods of temporary total disability benefits were also stipulated to be from November 29, 1988 through April 21, 1989 and from September 5, 1989 through June 12, 1990.

2. The Plaintiff, Mary K. Scearce, is presently 42 years ,of age. She testified that she quit school after the eighth grade at the age of, 13 and started working for the Defendant-Employer at the age of 16. Plaintiff worked as a sewing machine operator binding legs on briefs. She testified that this required pulling with both hands and using both feet on pedals. Plaintiff also stated that she averaged 200% of the required production level and worked eight to nine hours per day six days per week. After her return to work with restrictions, Plaintiff indicated that she was placed on a job as an examiner. This did not require the same physical capabilities that were necessary as a sewing machine operator.

Plaintiff testified that she stopped working on February 22, 1988 as a result of sharp pain which ran up her right arm into her shoulder and neck. She also developed pain in her left wrist, as well. The medical treatment provided by her physicians is described hereafter in the summary of medical evidence.

At the time of the Hearing, Plaintiff indicated that she was in constant pain, could not raise her arm and could not sleep, as her whole side feels numb and tingles. She

stated that the condition was affecting her more every day and she was unable to do housework, fix her hair and wear clothes that were not closed in the front. It was her opinion that she was totally incapacitated from working since June 12, 1990. Plaintiff had filed a claim for Social Security Disability Benefits which was still pending at that time.

3. The medical evidence considered in this claim is summarized as follows:

(a) Dr. Phil Aaron, a general practitioner, first examined the Plaintiff on February 22, 1988. Plaintiff indicated to him that she had had problems for two years previously, but did not miss any work. It was Dr. Aaron's diagnosis that Plaintiff had suffered an injury to her right shoulder, arm and both wrists and muscles.

Dr. Aaron rated Plaintiff as having a 27% AMA Guidelines impairment rating and reported that the problems which Plaintiff had with her fingers and wrists tingling would not be included in the rating. Dr. Aaron restricted the Plaintiff to no lifting due to the shooting pain it caused in her right arm and a prohibition against operating machinery.

(b) Dr. Narashimha Reddy, an orthopedic surgeon, first examined Plaintiff on March 4, 1988. Dr. Reddy relied upon an EMG which revealed subtle evidence of C-8, T-1 radiculopathy apart from bilateral carpal tunnel syndrome. He also noted that Plaintiff had had a normal MRI. Dr. Reddy performed arthroscopic surgery upon Plaintiff's right knee, which was unrelated to any work-related injury.

Dr. Reddy rated Plaintiff as suffering a 10% permanent functional impairment rating based upon the AMA Guidelines and the tables referencing the cervical region of her spine. Said doctor further indicated that the physical condition would cause. greater occupational implications. He restricted her to lifting 10 pounds maximum and 0 pounds frequently.

(c) Dr. Kenneth DeSimone, a general surgeon, examined Plaintiff on August 24, 1990. Dr. DeSimone diag-

nosed the Plaintiff as suffering from thoracic outlet compression based upon a positive Adson's Test, which indicated a reduction of Plaintiff's pulse. It wad said doctor's opinion that the diagnosis of carpal tunnel syndrome could not be made, but he did note tenderness on the lateral epicondyle of the musculature.

Dr. DeSimone rated Plaintiff as suffering a 38% functional impairment based upon the AMA Guidelines and McBride's Guide to Disability Evaluation. He further indicated that Plaintiff should be restricted to lifting 10 pounds maximum because of her right arm pain.

(d) Dr. Dennis O'Keefe, a neurologist, examined Plaintiff on October 29, 1990. Dr. O'Keefe interpreted Plaintiff's nerve conduction studies as being normal. He found no evidence of carpal tunnel syndrome and did not feel that the Plaintiff's complaints were a result of a work-related injury, as he found no abnormalities. Dr. O'Keefe stated that he did not perform the Adson's Test for the diagnosis of thoracic outlet syndrome, as he felt that it was an unreliable "terrible" test.

(e) Dr. Morton Kasdan, a hand surgery specialist, examined Plaintiff on March 16, 1989 upon referral by Dr. Miles. Dr. Kasdan indicated that all of tests he performed upon the Plaintiff were negative or normal except for the Phalen's Test, which indicated numbness and tingling and compression at Plaintiff's wrists. The neurological studies performed by Dr. Corwin, at Dr. Kasdan's request, were interpreted as being normal, but Dr. Corwin suspected that Plaintiff had a combination of tendonitis and musculoskeletal pain. Dr. Kasdan determined that Plaintiff did not have an AMA Guideline functional impairment. However, he recommended that Plaintiff enter a rehabilitation counseling program. He expected that Plaintiff would have problems with return to rapid repetitive work with her upper extremities.

(f) Dr. Stanley Collis, an orthopedic surgeon, examined Plaintiff on June 12, 1990. Dr. Collis found Plaintiff's examination to be entirely normal and found no work-

related problem. He rated Plaintiff as having a 0 disability, but reported that she might have ache and discomfort. It was his suggestion that work and normal activities would be best for her.

4. Vocational testimony was offered by William Summitt who evaluated the Plaintiff on December 3, 1990. In determining Plaintiff's loss of access to the labor market, Dr. Summitt relied upon the information given to him by the Plaintiff and the medical reports provided to him by the Defendant-Employer. Based upon the reports of Dr. Kasdan, and Dr. Aaron, Dr. Summitt indicated that Plaintiff should not be performing sewing machine work. He rated her as suffering an occupational loss of 11.23%. Dr. Summitt stated that if Plaintiff could return to work, she would have even less of an impairment with no loss. However, if he utilized only Dr. Reddy, Dr. Aaron's and Dr. DeSimone's report, Dr. Summitt stated that Plaintiff would have a 25% occupational loss. Dr. Summitt stated that if he used the reports of Dr. Collis, Dr. O'Keefe and Dr. Kasdan, Plaintiff would suffer no occupational loss. Finally, Dr. Summitt indicated that Plaintiff told him that she would be willing to go to work any time for $5.00 if she could do the job.

5. Based upon the Plaintiff's testimony at her discovery deposition and Hearing, the medical and vocational testimony and utilizing the principles announced in the case of *Osborne* v. *Johnson*, Ky., 432 S.W.2d 800 (1968), this Administrative Law, Judge determines that the Plaintiff has suffered an occupational disability of 50%.

In making this determination, the testimony of Dr. Aaron, Dr. Reddy and Dr. DeSimone was found to be most persuasive on the issue of the existence of Plaintiff's permanent functional impairment. The diagnosis made by Dr. Kasdan of Accumulative Fatigue Disorder, which he indicated was a synonym for Overuse Syndrome or Repetitive Strain Disorder, lends further credence to the findings of the above-mentioned doctors. Dr. Kasdan's recommendation of a rehabilitation counseling program and opinion

that Plaintiff would have problems with return to rapid repetitive work with her upper extremities, is, likewise, found to be convincing evidence to this Administrative Law Judge.

As it relates to the issue of causation, the Plaintiff's testimony regarding the physical requirements of her sewing machine operator job convinces this Administrative Law Judge that she has suffered an injury caused by the repetitive motion of her hands, wrists, arms and shoulders. This is the type of repetitive trauma injury referenced by the Court in the case *Haycraft* v. *Cohart Refractories Company*, Ky., 544 S.W.2d 222 (1977). Plaintiff's testimony is unrefuted about her average production level equalling 200%. She also testified, that this job was performed eight to nine hours per day six days per week and the Plaintiff's probative testimony on the issue of causation is found to be conclusive due to the supporting testimony of Dr. Aaron, Dr. Reddy, Dr. DeSimone and Dr. Kasdan.

6. The determination of the Plaintiff's occupational disability is based, in part, upon her young age, limited education and over 20 years of work with the Defendant-Employer. However, the testimony of Dr. Summitt, a vocational expert, was also considered. Dr. Summitt listed occupational losses ranging from 0% to 25%, depending upon which doctors were referenced. The 50% occupational disability finding is felt to be a fair reflection of Plaintiff's present occupational loss. In order to assist her in re-entering the labor market, this Administrative Law Judge finds that she is an excellent candidate for vocational rehabilitation services pursuant to KRS 342.710. This is also in conformity with Dr. Kasdan's recommendation.

CONCLUSIONS OF LAW

KRS 342.0011 KRS 342.020 KRS 342.710
KRS 342.730 Cases as cited.

ORDER AND AWARD

IT IS HEREBY ORDERED AND ADJUDGED by the undersigned Administrative Law Judge as follows:

1. The Plaintiff, Mary K. Scearce, shall recover of the Defendant-Employer, Fruit of the Loom, and/or its insurance carrier, the sum of $123.95 per week for 50% occupational disability beginning June 13, 1990 and continuing thereafter for a period not to exceed 425 weeks, together with interest at the rate of 12% per annum on all due and unpaid installments of such compensation, and the said defendant shall take credit for an payment of such compensation heretofore made.

2. The Plaintiff, Mary K. Scearce, shall further recover of the Defendant-Employer, and/or its insurance carrier, for the cure and relief from the effects of the injury such medical, surgical and hospital treatment, including nursing, medical an surgical supplies and appliances, as may be reasonably required at the time of injury and thereafter during disability, and the said Defendant shall take credit upon this Award for such medical, surgical and hospital expenses heretofore paid.

3. Plaintiff shall submit to an appropriate rehabilitation evaluation under the provisions of KRS 342.710.

4. All motions for approval of attorney's fees shall be filed with this Administrative Law Judge within 30 days after final disposition of this Award.

DATED this 7th day of February, 1992.

/s/ Thomas A. Dockter
Thomas A. Dockter
Administrative Law Judge

OPINION RENDERED: OCTOBER 2, 1992

COMMONWEALTH OF KENTUCKY
WORKERS' COMPENSATION BOARD

Claim No. 89-00667

UNION UNDERWEAR COMPANY, INC.
d/b/a FRUIT OF THE LOOM (INCORRECTLY NAMED
FRUIT OF THE LOOM, INC.) - - - - - - *Petitioner*

v.

MARY KAY SCEARCE and
HON. THOMAS A. DOCKTER, Administrative
Law Judge - - - - - - - - - *Respondents*

APPEAL FROM THE HON. THOMAS A. DOCKTER
ADMINISTRATIVE LAW JUDGE

REVERSING

BEFORE: ANGELUCCI, Chairman, GREATHOUSE, and TURNER, Board Members.

TURNER, MEMBER. Union Underwear Company, Inc. d/b/a Fruit of the Loom ("Union") appeals from an Opinion, Award and order rendered by Administrative -Law Judge Thomas A. Dockter ("ALJ") on February 7, 1992, wherein it was found that the claimant, Mary Kay Scearce ("Scearce"), was 50% occupationally disabled due to cumulative .trauma injury to her upper extremities. On appeal, Union argues that the medical evidence of record is insufficient to sup finding of causal nexus between Scearce's work at Union and her impaired condition. Union also launches a constitutional attack against the implementation of the provisions of KRS 342.033 allowing the introduction of the opinions of physicians in workers' compen-

sation proceedings through medical reports in lieu of deposition.

Scearce, born January 8, 1950, commenced work for Union as a sewing machine operator at the age of 16. Her work entailed repetitive arm and hand movements in the process of binding legs upon briefs. Over the years, Scearce labored at a pace which yielded 200% of her production quota. In approximately February 1986, Scearce experienced pain in her shoulders and neck for which she sought medical treatment. She explained that at that time she was required to tie her own work and throw it in a wagon. She surmised that this activity irritated her neck and shoulders. Claimant alleged that the pain started in the shoulder and neck area and ran down her right arm into the wrist. She labored as much as nine hours per day, six days per week. As told by Scearce, the condition became progressively worse until she was compelled to quit in September of 1989. She testified that the respite of unemployment had no effect on her condition and did not decrease the level of her pain.

Union challenges the award upon the ground that Scearce did not present an opinion from any medical witness categorically stating that she suffered any type of repetitive (or overuse) syndrome caused by her work. The evidentiary void is accountable in part to the fact that Form 107 medical reports were utilized to present the opinions of three of the claimant's physicians. Unfortunately, the form report routinely did not address the matter of the etiology of the worker's condition.

Dr. Phil Aaron evaluated Scearce on July 27, 1990, and through Form 107 reported that the patient had pain and tingling in the fingers with squeezing and handling, and that in Dr. Aaron's judgment, she was precluded 'from further work as a machine operator. Additional complaints included numbness and pain in her right shoulder. No assessment was made as to the cause of the claimant's condition.

Another Form 107 report was submitted on claimant's behalf from Dr. A. Narasimha Reddy and likewise it did not address the issue of work-relatedness. And finally, a Form 107 report of Dr. Kenneth J. S. DeSimone revealed that Scearce gave a "prolonged history of over use syndrome . . . of the right and left upper extremities," and that she had tingling in the right arm and a positive Adson's test for thoracic outlet compression. Yet, DeSimone's 107 expressed no opinion as to causation.

Union presented opinion testimony from Drs. Stanley Collis, Morton Kasdan and Dennis O'Keefe. Dr. Collis evaluated at the behest of the employer and adjudged Scearce's physical examination to be entirely normal. He concluded she had no disabling condition which necessitated release from work.

Hand surgeon, Dr. Morton Kasdan, evaluated Scearce on February 16, 1989, upon referral from Union's plant physician. By and large, the results of physical examination were normal but for a positive Phalen's test, which, according to Dr. Kasdan, can be indicative of nerve compression in the wrist. A consulting neurologist reported nerve conduction studies to be normal. Dr. Kasdan concluded that the claimant probably suffered cumulative fatigue disorder. However, he found no impairment under the AMA guidelines. Cumulative fatigue disorder was said to be synonymous with repetitive strain disorder and/or overuse syndrome. Particularly emphasizing the fact that Scearce had reported no improvement in her condition during her long period of unemployment, Dr. Kasdan opined that claimant's disorder was probably not work-related as cumulative trauma disorders generally improve with rest. Dr. Dennis O'Keefe, a neurologist, joined in Kasdan's opinion that nerve conduction studies were normal and that cumulative trauma injuries generally resolve with rest. He observed that the cause and symptoms of cumulative trauma syndrome are subjects of great contention. He found nothing upon Scearce's examination to lead him to believe that she had thoracic outlet syndrome.

As pertinent to the issue of causation, the ALJ found:

> As it relates to the issue of causation, the Plaintiff's testimony regarding the physical requirements of her sewing machine operator job convinces this Administrative Law judge that she has suffered an injury caused by the repetitive motion of her hands, wrists, arms and shoulders. This is the type of repetitive trauma injury referenced by the Court in the case *Haycraft* v. *Corhart Refractories Company*, Ky. 544 S.W.2d 222 (1977). Plaintiff's testimony is unrefuted about her average production level equalling 200%. She also testified that this job was performed eight to nine hours per day six days per week and the Plaintiff'S probative testimony on the issue of causation is found to be conclusive due to the supporting testimony of Dr. Aaron, Dr. Reddy, Dr. DeSimone and Dr. Kasdan.

Union filed Petition for Reconsideration arguing 'that there. was no evidence to establish work-relatedness. The ALJ overruled the Petition in an order dated March 25, 1992, wherein Dr. Kasdan's positive finding upon Phalen's test and his prediction that the claimant would have problems with a return to rapid repetitive work were cited as evidence supportive of the ALJ's conclusion.

Quite naturally on appeal Union contends that while the respondent's testimony may be relevant as to the extent and duration of occupational disability, the matter of causation must be established by medical opinion to a reasonable degree of probability. In response, Scearce counters that the totality of the evidence and circumstances surrounding her condition and the nature of the work constitute sufficient evidence upon which the ALJ could reasonably draw an inference of work-relatedness. Both litigants cite *Markwell & Hartz, Inc.* v. *Pigman*, Ky., 473 S.W.2d 842.(1971) as definitive case authority. Therein it is written:

> We do not mean to suggest that the opinion of a medical expert is always necessary to support a claim or that such opinions, when provided, are inevitably determinative one way or the other. 473 S.W.2d at 846.

As support for what may be referred to as claimant's totality of the circumstances theory, *Blair Fork Coal Company* v. *Blankenship*, Ky., 416 S.W.2d 716 (1967) is cited. Therein it is written:

> A claim for compensation under the Workmen's Compensation Act may be established by circumstantial evidence '. . . when the facts and circumstances detailed are so related to each other, that an inference of liability may be fairly drawn and without being based merely upon guess or surmise.' . . . 'The proof, it is true, may be direct, presumptive, or circumstantial, but legal proof, nevertheless, it must be.' (Citations omitted) 416 S.W.2d at 718.

In *Markwell & Hartz, Inc.* v. *Pigman, supra*, the former Court of Appeals ultimately determined that the claimant must submit the reasoned opinion of a medical expert in order to establish a causal nexus between a hearing loss and excessive noise exposure through the use of a jackhammer at work. This was so even though the onset of deafness was sudden and temporally associated with the work. Moreover, Pigman had presented as evidence the opinion of an otolaryngologist to the effect that there *could* be a causative relationship between jackhammer noise exposure and deafness.

In *Blankenship*, survivors of the worker successfully prosecuted a compensation claim for benefits arising from his death in an underground mine. Somewhat mysteriously, Blankenship, who was apparently in good prior health, was found dead in the mine with neither wounds nor burns upon his body, yet near a live electrical wire. A physician who examined the deceased stated that he had no idea what caused Blankenship's death. The Court of Appeals held that the evidence as a whole created a justifiable inference that Blankenship's death resulted from accident and injury. The Court particularly noted that a death certificate listing the cause as electrocution constituted prima facie, but not conclusive, evidence.

Certainly the ALJ as trier of fact is empowered to draw reasonable inferences from the totality of the evidence.

Jackson v. *General Refractories Company*, Ky., 581 S.W.2d 10 (1979). And where his ultimate findings are supported by substantial evidence they may not be disturbed upon appeal. *Smyzer* v. *B. F. Goodrich Chemical Company*, Ky. 474 S.W.2d 367 (1971) and *Special Fund* v. *Francis*, Ky., 708 S.W.2d 641 (1986). Admittedly, upon the claim sub judice, there is, voluminous circumstantial evidence establishing at least a temporal nexus between the repetitive work activity accomplished by the claimant at Union and the development of symptoms in her neck, shoulders and upper extremities. However, the association between the reported impairment and the work is not such as would be evident to a layman. As observed by the Court of Appeals in *Markwell & Hartz, Inc.* v. *Pigman, supra*, the instant claim is not comparable to one where a man has been shot in the head and dies immediately thereafter. We are unable to distinguish the instant claim from *Markwell & Hartz, Inc.*, the net effect of which is to constrain the degree to which the workers' compensation trier of fact can draw inferences with respect to causation. The association between repetitive work activity and over use syndromes or conditions, e.g. carpal tunnel syndrome and thoracic outlet compression, is perceived by some as a matter of common knowledge. However, we believe that the ALJ is precluded from making determinations as to medical matters by resorting to what may be deemed public knowledge. Instead, the ALJ must turn to the proof in a given case. In the claim sub judice, the opinions of Drs. Kasdan and O'Keefe that Scearce's condition is not work-related are uncontradicted by countervailing medical testimony. Such uncontradicted opinion evidence from the medical experts cannot be summarily cast aside by the trier of fact. *Mengel* v. *Hawaiian-Tropic Northwest and Central Distributors, Inc.*, Ky. App., 618 S.W.2d 184 (1981).

Therefore, following established case precedent, absent a reasoned medical opinion establishing a causal nexus between the work and the impaired condition, there is no substantial evidence to support a finding of work-relatedness.

The decision of the ALJ is therefore REVERSED and the, matter is REMANDED with direction to enter an order of dismissal. This renders moot Union's appeal relative to the submission of medical reports as evidence.

ALL CONCUR.

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ADMINISTRATIVE LAW JUDGE:
Hon. Thomas A. Dockter
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Louisville, KY 40202

RENDERED: SEPTEMBER 24, 1993; 10:00 A.M.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 92-CA-002648-WC

MARY KAY SCEARCE - - - - - - - - *Appellant*

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-89-00667

UNION UNDERWEAR COMPANY, INC.
d/b/a FRUIT OF THE LOOM and
WORKERS' COMPENSATION BOARD - - - - *Appellees*

AND

No. 92-CA-002789-WC

UNION UNDERWEAR COMPANY, INC.
d/b/a FRUIT OF THE LOOM - - - *Cross-Appellant*

v.

CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-89-000667

MARY KAY SCEARCE and
WORKERS' COMPENSATION BOARD - - *Cross-Appellees*

AFFIRMING IN PART and REVERSING IN PART

BEFORE: GARDNER, GUDGEL, and JOHNSON, Judges.

GARDNER, JUDGE: Mary Kay Scearce (Scearce) appeals from an order of the Workers' Compensation Board, (the board) which reversed the Administrative Law Judge's (ALJ) award of permanent partial disability benefits. Union Underwear Company, Inc. (Union) cross-appeals. We affirm in part and reverse in part.

Scearce began working for Union as a sewing machine operator in approximately 1966. Her duties at Union included the binding of garments which necessitated repetitive arm and hand movements. In 1986, while still at Union, Scearce began experiencing pain in her upper extremities. She sought medical treatment, and continued to work for approximately three years. In late 1989, her condition became progressively worse and she quit her employment.

Scearce subsequently filed a claim for workers' compensation benefits, and the matter went before the ALJ. Scearce offered into evidence the medical reports of three examining physicians, each of whom found her to be suffering from tingling and numbness in the upper extremities, thoracic outlet compression, or other related disorders. Union also presented medical testimony from three examining physicians. One doctor opined that Scearce was not suffering from a disabling condition which necessitated her release from work, and the other two were in general agreement that she was suffering a repetitive trauma disorder but that it was not work-related as it had not improved during her long period of unemployment.

Upon considering the proof, the ALJ determined that Scearce had suffered a work-related debilitating injury and awarded her permanent partial disability benefits. As to the issue of causation, the ALJ found that while there was no direct medical evidence linking the injury to the employment, the causal link had nevertheless been sufficiently established by the totality of the evidence. Union's subsequent petition for reconsideration was denied, and it appealed to the board. Upon considering the matter, the board concluded that the causal nexus connecting Scearce's employment to her injury had not been established by substantial evidence, and the ALJ's order awarding benefits was reversed and remanded. This appeal followed.

The primary issue now before us relates to the question of causation. Scearce maintains that the totality of the evidence presented to the ALJ inevitably leads to the

conclusion that her repetitive strain disorder resulted from her years of employment with Union, and that the board therefore had no authority to set aside the award. Union argues in response that established case precedent mandates the presentation of medical testimony which establishes a causal nexus between the work and the impaired condition, and in the lack thereof the ALJ may not award disability benefits. Having carefully studied the facts and the law, we agree with Scearce and must reverse on this issue.

While it is true that the mere possibility of a causal connection between the employment and the injury is not enough to support a finding of such a connection as a fact, *Markwell & Hartz, Inc.* v. *Pigman*, Ky., 473 S.W.2d 842 (1971), citing *Kelly Contracting Company* v. *Robinson*, Ky., 377 S.W.2d 892 (1964), it is also well established that "[m]edical evidence . . . must be considered not as determinative but rather as part of the totality of circumstances upon which the board [now ALJ] must make the factual determination [with respect to causation] . . ." *Hudson* v. *Owens*, Ky., 439 S.W.2d 565, 569 (1969). In the case at bar, the medical evidence connecting Scearce's employment to her disability is tenuous. We believe the evidence when viewed as a whole, however, is nevertheless sufficient to establish the necessary causal nexus. It is uncontroverted that Scearce worked for more than twenty years in a position requiring repetitive arm and shoulder movement, that the onset of her condition occurred during her employment, and that the condition from which she suffers is compatible with the repetitive movements the job required. Furthermore, the record reveals that at least one treating physician, namely Dr. Phillip R. Aaron, expressly opined that the injury was work-related. The question on which this appeal turns, however, is whether the findings of the ALJ were supported by substantial evidence. *Special Fund* v. *Francis*, Ky., 708 S.W.2d 641 (1986); *Bethenergy Mines, Inc.* v. *Easterling*, Ky. App., 776 S.W.2d 842 (1989). Substantial evidence is that which would tend to induce conviction in the minds of reasonable men. *Smyzer* v. *B. F.*

Goodrich Chemical Company, Ky., 474 S.W.2d 367 (1971). Having studied the record, we believe the evidence on which the ALJ based his findings could reasonably be characterized as substantial. Accordingly, we must reverse on this issue.

Union also cross-petitioned below, arguing that KRS 342.033 and 803 KAR 25:011 §13, which provide for the use of Form 107 to introduce medical evidence before the ALJ, are unconstitutional as they deny the respondent the opportunity to cross-examine the maker of each report. The board found this issue to be moot in light of their reversal, and Union now cross petitions for review of that decision.

Union's argument that it was not availed of the opportunity to cross-examine Scearce's treating physicians is without merit. Neither KRS 342.033 nor 803 KAR 25:011 §13 prevent such cross-examination. Union could have deposed any or all of the physicians, but chose not to do so. While it argues that it was denied the opportunity to cross-examine the physicians, the corpus of its argument is that it doesn't wish to bear the cost for that cross-examination. We are aware of no statutory law or case law within this jurisdiction which compels that the cost of cross-examination be borne by the claimant. If a respondent employer wishes to cross-examine a treating physician it may certainly do so, but it must bear the cost. The purpose of the amended workers' compensation statute is to provide for the swift and inexpensive resolution of compensation claims. *See generally*, William Haynes, *Kentucky Jurisprudence—Workers' Compensation*, § 1.4 (1986). Shifting the cost of cross-examination to the claimant would do nothing to further that purpose.

Union has cited a number of out-of-state cases in support of its position. The most recent, namely *Paco* v. *American Leather Mfg. Co.*, 516 A.2d 623 (N.J. 1986), stands for the proposition that a failure to allow cross-examination is a denial of due process. It went on to note that the compensation judge is vested with the statutory authority to

allocate the medical experts' fees between the petitioner and respondent. In the case at bar, however, Union was never denied the opportunity to cross-examine Scearce's treating physicians. 803 KRS 25:011 §13(10) expressly states that "If a written medical report is admitted as direct testimony, any adverse party may depose the physician making the written report as cross-examination concerning it, and the deposition shall be filed as proof without a motion." Unlike *Paco* and the other cases cited, Union was availed of the opportunity to cross-examine Scearce's physicians. It simply chose not to do so.

Union next argues that use of Form 107, which allows for the submission of unsworn medical testimony, is violative of CR 43.04(l). That rule requires that testimony in a civil proceeding be given under oath. The rule is effective, however, "unless otherwise provided by these rules or by statute." CR 43.04(l). Use of Form 107 falls within this exception, we believe, as the administrative regulation which provides for the use of Form 107 was promulgated in accordance with express statutory authorization. See KRS 342.033, which provides that "[t]he board shall promulgate administrative regulations prescribing the format and content of written medical reports." As a safeguard against the introduction of false information in an unsworn medical report, the employer may depose the physician and cross-examine him or her under oath. 803 KAR 25:011 §13.

Union also argues that use of Form 107 is improper because it elicits conclusions from the witness which should be reserved for the ALJ, i.e., whether the claimant's functional impairment will have an occupational implication greater than the functional impairment assessed. This extraneous information, it contends, renders Form 107 constitutionally infirm. We believe the so-called "residuum rule" is dispositive of this issue. It provides that "findings of an administrative agency will be upheld despite its partial reliance upon incompetent evidence if it also had before it competent evidence which by itself would have been

legally sufficient to support the findings." *Haste* v. *Kentucky Unemployment Insurance Commission*, Ky. App., 673 S.W.2d 740 (1984), citing *Big Sandy Community Action Program v. Chaffins*, Ky., 502 S.W. 2d 526 (1973) As there was sufficient legally competent evidence in the record to support the ALJ's find of occupational disability, we cannot find that the alleged presence of extraneous information in the Form of 107 gives rise to reversible error.

Finally, Union argues in very general terms that KRS 342-033 and 803 KAR 25:011 §13 are unconstitutionally vague and therefore void. As it cites no authority in support of this proposition, we do not find this argument to be persuasive. *See Pierson* v. *Coffey*, Ky. App., 706 S.W.2d 409 (1985).

For the foregoing reasons, the order of the Workers' Compensation Board is reversed as it relates to Searce's claim for benefits, and in all other respects is affirmed.

ALL CONCUR.

ATTORNEY FOR APPELLANT/CROSS-APPELLEE MARY SCEARCE:
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William A. Miller, Sr.
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SUPREME COURT OF KENTUCKY

File No. 93-SC-000865
92-CA-002648
WC-89-000667

UNION UNDERWEAR COMPANY, INC.
d/b/a FRUIT OF THE LOOM (INCORRECTLY NAMED
FRUIT OF THE LOOM, INC.) - - - - - - *Appellant*

v.

MARY KAY SCEARCE and
THOMAS A. DOCKTER, Administrative
Law Judge - - - - - - - - - - *Appellees*

PETITION FOR REHEARING ON BEHALF OF APPELLANT, UNION UNDERWEAR COMPANY, d/b/a FRUIT OF THE LOOM

This 7th day of March, 1995.

HARNED, ANDERSON & BACHERT
P.O. Box 1270
Bowling Green, KY 42102-1270
Telephone: (502) 782-3938
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/s/ Norman E. Harned
Norman E. Harned
Joy D. Denton

CERTIFICATION:

This is to certify that a true and correct copy of the foregoing was this 7th day of March, 1995, placed in the U.S. Mail addressed to the following: Hon. Morris Butler, 202 W. Court St., P.O. Box 280, Greensburg, KY 42743; Hon. Thomas A. Dockter, 624 W. Main St., 4th Floor, Louisville, KY 40201-3167; Hon. William A. Miller, Sr., 17th Floor Kentucky Home Life Bldg., 239 S. 5th Street, Louisville, KY 40202-3269; Hon. Chris F. Gorman, Attorney, General, State Capitol, Frankfort, KY 40601.

/s/ Norman E. Harned
Norman E. Harned
Joy D. Denton

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INTRODUCTION

This Workers' Compensation case involves two issues for purposes of appeal. First, whether KRS 342.033 and the regulations of the Workers' Compensation Board, which allow a party to introduce unsworn statements of doctors into evidence, while placing on the opponent the burden of scheduling and paying for cross-examination of the witness, are invalid as a denial of constitutional due process. Second, whether the Kentucky Court of Appeals exceeded the applicable scope of review and erroneously applied the law in reversing a determination by the Workers' Compensation Board that the claimant did not sustain a work-related injury. The majority opinion of this Court misconceived the issues that were presented for appeal. As such, the Appellant, Union Underwear Company, Inc. d/b/a Fruit of the Loom [hereinafter "Fruit of the Loom"] petitions the Court for a rehearing.

ARGUMENTS

I.

THE MAJORITY'S OPINION IGNORES FRUIT OF THE LOOM'S FUNDAMENTAL RIGHT OF DUE PROCESS

The Workers' Compensation Act statutorily defines the employers who are mandatorily subject to coverage under the Workers' Compensation Act to include "any person, other than those engaged solely in agriculture, that has in this state one or more employes subject to this chapter." KRS 342.630. As such, employers, other than those engaged solely in agriculture, are mandatorily subject to the provisions of the Act. However, any employee who would otherwise be covered by the provisions of the Workers' Compensation Act has a choice of opting out of coverage. KRS 342.640. In other words, employees are automatically covered by the Act unless they decide they do not want the protection of the Act. No such, "opt out" provision is available for employers.

Simply because an employer is mandatorily subject to the Act does not translate to a loss of an employer's due

process rights. There is certainly no issue that an employer has a due process right to cross examine witnesses who testify against it in a civil case in circuit court. The statutory mandate that workers' compensation claims be decided in an administrative forum does not mandate that the employer loses its due process rights. However, to require the employer to pay for the right to cross examine witnesses who testify against the employer, as the majority opinion of this Court provides, is tantamount to the taking of property of the employer without due process. We were not aware that the Court had placed a price on cross-examination or shifted the burden of producing a witness for cross-examination to the party against whom the witness has offered an unsworn report prior to the majority opinion in this case. *cf. Bell* v. *Commonwealth*, Ky., 875 S.W.2d 882 (1994).

The majority of the Court finds that "there is no state law or statutory law within this jurisdiction which asserts that the cost of cross-examination must be borne by the proponent of the direct examination." (See majority Opinion of the Court, p. 4). Obviously, there is no case law and no statutory law, directly on point, within this jurisdiction as the Court has further indicated that this is an issue of first impression before the Court. (See majority opinion of the Court, p. 2). However, the majority's opinion ignores over 200 years of fundamental due process law in Kentucky. In addition, it should be noted that at no time, has Scearce cited any authority whatsoever, from this state or any other state, in support of her argument.

On the other hand, as set forth in Fruit of the Loom's Brief on behalf of the Appellant, all other states who have considered this issue are in agreement that the proponent of the medical report must make the author of the report available for cross-examination and must bare the expense for providing the opportunity of cross-examination to the adverse party. As one Court held:

> This whole question would present an entirely different aspect if the record disclosed that respondent had

> been deprived of the right to cross-examine Dr. Thompson on the matters contained in his report *or if opportunity was afforded it only at its own expense.* (emphasis added).

Natalizia v. *Atlantic Tubing & Rubber Co.*, R.I., 105 A.2d 190 (1954).

The Court in *Natalizia* addressed the very issue presented on this appeal and found that medical reports may be admitted as evidence *only* on the condition that the *offering party* produce the author of the report for cross-examination. Other states have uniformly held the same. Why do the citizens of Montana, Oregon, Rhode Island, Alaska, Arizona, Louisiana and North Dakota have rights that the citizens and employers of Kentucky do not? The majority's opinion in the present case does not discuss this issue.

The opinion of the majority of the Court has translated Fruit of the Loom's constitutional due process right to cross-examination into an economic matter. If the employer must pay for and arrange for the cross-examination of witnesses who testify against the employer, cross-examination ceases to be a right and becomes only a privilege for those willing to pay.

The real issue presented in this case is the integrity of the judicial system. It has long been accepted that cross-examination is the best tool for finding the truth. As this Court has held, "cross-examination is a time-tested and unique method of assisting in the quest for truth . . . Without such opportunity, the search for truth may very well be impeded and restricted." *Kaelin* v. *City of Louisville*, Ky., 643 S.W.2d 5901 592 (1982). The majority's opinion, in the present case, ensures that the "opportunity" for cross-examination is afforded to only those who are willing to pay. The search for truth for those who are not willing to pay is impeded and restricted in direct contradiction to this Court's prior holding in *Kaelin* v. *City of Louisville*, *Supra*. As one Court has held:

> The high cost of producing medical testimony, although a heavy burden for the injured employee to bear in some instances, simply cannot justify the trammeling of fundamental rights in a contested formal proceeding.

Paco v. *American Leather Mfg. Co.*, N.J. Super., 516 A.2d 623, 627 (1965).

The Court, in its majority opinion, states that the rule applies equally to the claimant and the appellant in this case. (See majority Opinion of the Court, p. 3). However, the Court misconstrues the issue. The issue is not the uniformity of the application of the rule. The issue is whether the rule provides due process to either party. Additionally, whether the rule constitutes a taking of property from the employer without due process. The employee has the option of electing not to be covered by workers' compensation. However, Fruit of the Loom has no such choice. It is mandated by statute that Fruit of the Loom be covered by and fall within the statutory authority of the Workers' Compensation Act. However, by taking Fruit of the Loom's right to cross-examination and translating that to a privilege, the Court has denied Fruit of the Loom's due process rights and has taken property from Fruit of the Loom without constitutional due process.

The Court cites *Kaelin* v. *City of Louisville*, Ky. 643 S.W.2d 590 (1982), for the proposition that administrative due process does not require the cost of cross-examination be borne by the proponent of the direct examination. (See Opinion of the Court, pp. 3-4). As the Court in Kaelin stated, the sole issue to be determined was whether the right of cross-examination is required by due process of law in a trial-type adjudicatory hearing before an administrative body. *Kaelin* v. *City of Louisville*, 643 S.W.2d at 590. The Court specifically held, in Kaelin, that "in a trial type adjudicatory hearing before an administrative body, the *right* of cross-examination is required by due process of law." *Id.*, at 592 (emphasis added). We would point out that the Court, in *Kaelin*, held that it is a *right* of cross-

examination, not a privilege to be bought by the opposing party. See *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970).

The Court's conclusion that if the claimant is required to produce the physician for cross-examination the introduction of medical reports would be eliminated in the workers' compensation system is simply incorrect. Such conclusion by the Court is not based upon any facts as shown in the practice of workers' compensation cases. For example, a provision in KRS 342.121 that has now been repealed, required the Workers' Compensation Board to appoint a physician to examine the claimant in every case in which the Special Fund was a party. The Board appointed physician was then required to file his report of record. Any party was allowed to depose the examining physician. Based upon numerous years of experience of the undersigned, the deposition of the examining physician was rarely taken. The taking of the deposition of such examining physician was usually limited to cases where a claimant had given an untruthful history or where the physician did not have all of the prior medical records and medical history of the claimant. There is no reason to believe that the physician's depositions would be taken for any different reasons at the present time. After all, the parties would still be required to bare the costs of their own attorney and copy of transcript. They would not do so unless a necessity existed.

The Court's statement that the employer would demand the right of cross-examination in each and every case is simply unfounded. There is no such evidence from the undersigned's over 25 years of experience in the workers' compensation arena. There is no factual evidence from which the Court could make such a sweeping conclusion. In addition, it should be remembered that the claimant has the same right to demand that the employer produce for cross-examination any physician from whom the employer has filed a report. The actual result would be that honest and fair reports would go unchallenged while re-

ports which contained exaggerated opinions, opinions that are not based upon fact, opinions not supported by the credentials of the witness, opinions written by the party's attorney (yes, it has occurred) and reports containing altered treatment records (yes, we have seen some of these too) would be challenged on cross-examination. Other states have uniformly recognized this issue and protected the integrity of due process in trial-type adjudicatory hearings before administrative bodies, however, by the majority opinion, Kentucky has now declined to do so.

A majority of the Court has held that the granting of due process would defeat the alleged purpose of the amended workers' compensation statute of providing for the swift and inexpensive resolution of workers' compensation claims. Without debating the validity of that conclusion, there is no explanation or indication of how or why the resolution of the claim would be impeded. Even so, when did the finding of truth have a price tag? When did fettering out false testimony of injury and/or disability increase costs? When did impeachment of the credibility of a witness or discovery of untruthful expert testimony become an injustice?

To carry the majority's Opinion to its logical conclusion, the workers' compensation statute could be amended to allow lay witnesses or even the claimant to testify by "report." If so, will the Court still require the opposing party to pay for the right of cross-examination? What if a party sent medical records to a workers' compensation "mill" in California for a "medical" opinion and filed such a report? Would the opposing party be required to pay to cross examine that witness? Clearly, the majority opinion has misconstrued the issues and/or the applicable law. As such, the Court should conduct a rehearing and enter an opinion consistent therewith.

II.

THE MAJORITY'S OPINION AS TO WORK-RELATEDNESS IS IN CONTRADICTION TO THE ESTABLISHED LAW

The majority's Opinion relies upon the "totality of evidence" to find that Scearce established that her condition is work related. However, in Workers' Compensation cases, the totality of evidence standard, for determining causation, is limited to cases involving heart attacks. *Moore* v. *Square D*, Ky., 518 S.W.2d 781 (1974). In addition, the problem with the totality test is that it does not subject the hypothesis to the test of the scientific method. In this case, Scearce looks as normal as any member of this Court or attorney in this case in that one cannot tell by looking at her that she may or may not be injured. A medical doctor can compare Scearce's subjective symptoms with the objective findings, or lack thereof, and determine a basis for the complaints or an absence of a basis if such is the case. Scearce may relate her symptoms but she cannot establish the cause of those symptoms because there is no indication that she has any expert medical knowledge. Neither the attorneys in this case, the Administrative Law Judge or the members of this Court can determine the cause of, or if, she has an injury. This is totally in contrast to a man having a bullet hole in his chest from a gun shot and thereafter dying as a result as in the *Markwell & Hartz* v. *Pigman*, Ky., 473 S.W.2d 842 (1971) case. Clearly, the majority applies an incorrect standard for purposes of determining causation and impermissibly removes the requirement of competency for the admission of expert testimony.

The real problem in this case is that the physicians presented on behalf of Scearce were never asked the question of what caused the Plaintiff's condition. It is clear that Kentucky case law requires that work-relatedness be established within reasonable medical probability when the cause is not obvious to a layman. *Markwell & Hartz* v. *Pigman, Supra; Young* v. *L.A. Davidson, Inc.*, Ky., 463

S.W.2d 924 (1971). In the present case, the physicians testifying on behalf of Scearce were simply never asked their opinion as to causation. In contrast, the physicians testifying on behalf of Fruit of the Loom clearly expressed their opinion that Scearce's condition is not work-related.

The Court is once again leaving open to potential abuse the definition of causation, the equivalent in civil cases of the concept of proximate cause. The legislature recently signaled its intention to tighten the type of cases to be compensated by eliminating "mental/mental" claims from compensability. KRS 342.0011(1). The legislature also amended the Act to require that medical proof, in black lung cases, fall within "accepted medical standards". KRS 342.732(2). Just as no one can look at Scearce and determine whether she has the injury of which she complains, no one can look at a miner and determine whether he has black lung. As such, this Court should require that Scearce prove her claim with competent medical proof, not by her own self-serving testimony. The Court should not now enlarge the potential for abuse by allowing a claimant's testimony to determine medical questions or the use of the "totality of evidence" test to establish causation in the absence of scientific medical evidence to support the claim.

CONCLUSION

We do not want the Court to misconstrue the Appellant's position. We do not argue that medical reports should be prohibited. However, if that evidence is introduced on direct examination by report, the party offering must at its expense make the witness available for cross-examination if the opposing party so demands. Further, the Court should not waive the requirement of competency for medical opinions within reasonable medical probability. For the reasons set forth above and the reasons set forth in Fruit of the Loom's Brief and Reply Brief filed herein, Fruit of the Loom respectfully requests the Court to enter an opinion and order consistent herewith.

This 7th day of March, 1995.

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APPENDIX

RENDERED: FEBRUARY 16, 1995
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

93-SC-000865-WC

UNION UNDERWEAR COMPANY, INC.
d/b/a FRUIT OF THE LOOM - - - - - *Appellant*

v.

MARY KAY SCEARCE,
WORKER'S COMPENSATION BOARD - - - - *Appellee*

APPEAL FROM COURT OF APPEALS
NO. 92-CA-002648
(WORKERS' COMPENSATION BOARD)

OPINION OF THE COURT BY SPECIAL JUSTICE
ROBERT E. GILLUM

AFFIRMING

Mary Kay Scearce (Scearce) quit school after the eighth grade and began working for the appellant at age sixteen (16). For twenty-one (21) years Scearce was a sewing machine operator, working eight to nine hours per day, six days a week, averaging Two Hundred (200%) percent of her production quota. The type of work Scearce performed required repetitive motion of her hands and arms.

In February, 1986, Scearce began experiencing pain in her right arm, shoulder and neck. Later she developed pain in her right wrist. The pain increased over time and Scearce was placed on temporary, total disability. She shortly returned to work as an examiner. However, as a result of continued pain Scarce was again placed on temporary, total disability. Thereafter, she filed this claim. Scearce testified that after she ceased working, her condi-

tion worsened, she was in constant pain, she could not raise her arm, could not sleep and she experienced numbness and tingling in her right side.

The Administrative Law Judge (ALJ) entered an Opinion and Award in favor of Scearce, finding that she had sustained a fifty percent (50%) permanent, partial, occupational disability. Appellant's Petition for Reconsideration was denied.

On appeal to the Workers' Compensation Board (the Board), the appellant asserted two arguments. First, appellant contends that there was insufficient evidence that Scearce's condition was work-related. Second, appellant argues that the use of the Form 107, as provided by KRS 342.033 and 803 KAR 25:011 §13, was constitutionally defective. The Board reversed the ALJ, basing its findings on appellant's first argument that there was no substantial evidence that Scearce's condition was caused by work.

The Court of Appeals reversed the Board, reinstating claimant's award of benefits.

The first issue before this Court is one of first impression.

I. IN A HEARING BEFORE AN ADMINISTRATIVE BODY IS IT A VIOLATION OF CONSTITUTIONAL DUE PROCESS TO REQUIRE THE PARTY DESIRING CROSS-EXAMINATION TO ASSUME THE COST' OF CROSS-EXAMINATION?

In this action the claimant, Scearce, introduced three (3) medical reports pursuant to KRS 342.033 and the Kentucky Workers' Compensation Board Rules of Procedure, 803 KAR 25:O11, §13. The appellant filed one (1) medical report under these provisions, and chose to take its remaining medical proof by deposition. Appellant filed objections to the introduction of claimant's medical reports and demanded that the physicians be produced for the purpose of cross-examination. The Administrative Law Judge (ALJ) overruled the objections of appellant.

The primary purpose of the workers, compensation stat-

ute is the elimination of common-law actions for personal injuries growing out of industrial operations. *Releford* v. *Eastern Coal Corp.*, 260 F.2d 447, cert. denied, 79 S.Ct. 797, 359 U.S. 958, 3 L.Ed.2d 765.

The purpose of the amended workers, compensation statute is to provide for the swift and inexpensive resolution of compensation claims. *See generally*, William Haynes, *Kentucky Jurisprudence* —Workers' Compensation, §1.4 (1986).

Appellant, in this case, was never denied the opportunity to cross-examine the claimant's physicians. 803 KAR 25: 011 §13 (10) expressly provides for cross-examination when it states:

> If a written medical report is admitted as direct testimony, any adverse party may depose the physician making the written report as cross-examination concerning it, and the deposition shall be filed as proof without a motion.

This rule applied equally to the claimant and the appellant in this case. The appellant chose not to incur the cost of cross-examination of claimant's physicians.

Administrative due process does require that cross-examination be guaranteed. *Kaelin* v. *City of Louisville*, Ky., 643 S.W.2d 590 (1982). However, administrative due process does not require that the cost of cross-examination be borne by the proponent of the direct examination. There is no case law or statutory law within this jurisdiction which asserts that the cost of cross-examination must be borne by the proponent of the direct examination. Under the provisions of KRS 342.033, either party is permitted to introduce direct testimony from a physician through a written medical report subject to cross-examination by the adverse party. If the claimant is required to produce, at claimant's expense, the physician for cross-examination, the introduction of medical reports as direct testimony under the provisions of KRS 342.033 would be eliminated. In each case the employer would demand the production of

the physician at a deposition for cross-examination, and the claimant would not compound the cost by having the physician, prepare the written report and also appear for deposition. This would defeat the purpose of the amended workers, compensation statute of providing for-the swift and inexpensive resolution of compensation claims.

II. WERE THE FINDINGS OF THE ALJ THAT THE INJURIES SUSTAINED BY SCEARCE WERE WORK RELATED SUPPORTED BY SUBSTANTIAL EVIDENCE?

The facts as to claimant's work history, as set out above, were part of the ALJ's findings of fact. In addition, the ALJ found that the existence of claimant's permanent functional impairment was supported by the report of three (3) physicians. The ALJ went on to find, "The diagnosis made by Dr. Kasdan of Accumulative Fatigue Disorder, which he indicated was a synonym for Overuse Syndrome or Repetitive Strain Disorder, lends further credence to the findings . . . ."

The Workers' Compensation Board's opinion found that the uncontradicted opinion evidence that the claimant's condition was not work related could not be summarily cast aside by the trier of fact. Citing *Mengel* v. *Hawaiian Tropic Northwest and Central Distribution, Inc.*, Ky.App., 618 S.W.2d 184 (1981). The Court of Appeals went on to say in this case, that there are some situations in which a board (ALJ) will be upheld on review when the board (ALJ) had made findings contradicting the medical testimony *(Id.*, at 186).

When the Workers' Compensation Board reviews the findings of the ALJ, its review is restricted to a determination of whether the factual findings of the trier of fact was "clearly erroneous." *Hudson v. Owens*, Ky., 439 S.W.2d 565, 568 (1969). In addition, the Court of Appeals stated, "The medical evidence, although relevant and material, must be considered not as determinative but rather as a part of the totality of the circumstances upon which the board (ALJ) must make the factual determination. . . ." (*Id.*, at 569).

After reviewing the record, we find the findings of the ALJ were supported by substantial evidence; that is, evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men. *Smyzer* v. *B. F. Goodrich Chemical Company*, Ky., 474 S.W.2d 367, 369 (1971)

For the foregoing reasons the opinion of the Court of Appeals is affirmed.

Leibson, Reynolds, Spain and Wintersheimer, JJ., concur.

Stephens, C.J., files a separate dissenting opinion in which Stumbo, J., joins. Lambert, J., not sitting.

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SUPREME COURT OF KENTUCKY

93-SC-000865-WC

UNION UNDERWEAR COMPANY, INC.
d/b/a FRUIT OF THE LOOM - - - - - *Appellant*

v.

MARY KAY SCEARCE,
WORKER'S COMPENSATION BOARD - - - - *Appellee*

APPEAL FROM COURT OF APPEALS
NO. 92-CA-002648
(WORKERS' COMPENSATION BOARD NO. 89-000667)

DISSENTING OPINION BY CHIEF JUSTICE STEPHENS

Respectfully I dissent.

While I agree with the majority that there was sufficient evidence to prove that Scearce's condition was work-related and would affirm on those grounds, I cannot agree that Fruit of the Loom was not denied Constitutional due process, in these administrative proceedings.

The United States Constitution necessitates that parties be guaranteed the right to cross-examine adverse witnesses in administrative proceedings. See *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970); *Kaelin* v. *City of Louisville*, 643 S.W.2d 590 (1983). The cost of cross-examination must be assumed by the party introducing the medical reports pursuant to KRS 342.033 to ensure the due process guarantees of the Constitution are met.

Although the administrative regulation provides for the possibility of cross-examination, it does not ensure that this fundamental right will be guaranteed. Because Fruit of the Loom is guaranteed these rights under the Constitution, they should not be compelled to bear the expense of taking that opportunity as a result of the actions of an adverse party.

As a result of the foregoing, I dissent.

Stumbo, J., joins in this dissenting opinion.

KENTUCKY WORKERS' COMPENSATION REFORM: A YEAR IN REVIEW AND A DECADE OF CRISIS 1994 HOUSE BILL 928

Presented by Walter W. Turner

No legislative chronicle documents are rationale by which the General Assembly enacted House Bill 928 in April of 1994, Sweeping changes were made to the Workers' Compensation Act (KRS Chapter 324) in multiple areas, *e.g.* the administration of the program, the level and duration of indemnity benefits, the manner in which treating physicians are selected, the amount or reimbursement for medical services and in the character of the institutions through which employers secure their workers' compensation liability. The volume of statutory changes embodied by House Bill 928 compels the conclusion that the General Assembly sensed a crisis in the workers' compensation program. But, the absense of legislative history lends to speculation as to what program failings the General Assembly intended to fix.

Supposition is not necessary, however, to conclude that the chief legislative concern in 1994 was the cost of the compensation program for Kentucky employers. The new law is replete with provisions designed to lower insurance premiums. Evidence of this intent lies within sections containing the award of disability benefits, harnessing the delivery of medical services and creating new competition for premium dollars. The resounding, if not hysteric cry of Kentucky industry to the effect that the cost of the compensation program throttled its ability to compete in a global economy found the attentive ear of the General Assembly.

Despite the vociferous nature of the charge, standing alone employer complaints about the cost of the program would not have propelled the legislature to action. After all, employer dissatisfaction with compensation programs is both chronic and virtually universal. Turbulent elements are essential to create an environment conducive to workers' compensation reform. These include widespread

belief that the law as written is unjust and fear that the funding mechanisms supporting the program are in danger of collapse.

For years, the forces of labor and industry have struck almost perfect balance in the General Assembly. That equality of power generates extreme resistance to passage of any measure which significantly alters the workers' compensation program. A head count would reveal that labor legislators are outnumbered by members aligned with business. However, labor's position on workers' compensation issues has traditionally been reenforced by the lobbying muscle of the medical and legal professions. Any call for variance from the status quo in terms of provider choice, blank check medicals and disability payments is met with challenge by the triad of labor-physicians-lawyers. The foundation of this alliance is clearly visible if one follows the workers' compensation money trail.

In 1994, a wedge was driven in the common ranks of labor medicine and the bar. During the preceding decade annual inflation in the cost of treating Kentucky's workers had been double digit. By the eve of the 1994 General Session, it was widely reported that medical providers received 54% of the payout in workers' compensation benefits. The size of the slice of the pie consumed by physicians and hospitals smacked of injustice in the view of labor and legal camps. It was felt that the workers' compensation program which had originated as a means to grant a measure of financial security to disabled workers was trucking the bulk of its money in the wrong direction. Physicians and hospitals became the accessible target for cost cutters because of the perception that the medical take from the program was too great. Struggling to maintain disability payment levels, labor and the bar were willing to sacrifice unrestricted employee choice of provider. They accepted managed care, KRS 342.020, more stringent medical fee schedules, KRS 342.035, mandatory utilization review, *id* Section 4 and practice parameters which narrowed the range of treatment modalities to be prescribed

by physicians, *id* Section 8. No doubt, acceding to aggressive medical cost containment provisions may have been prompted by selfish motives within the bar. The least painful reform for attorneys is that which attacks aspects of the program from which the bar customarily derives no fee.

The 1994 workers' compensation reform was also advanced by a multi-faceted funding crisis. The voluntary market through which employers purchase workers' compensation insurance from a carrier willing to write Kentucky coverage was dwindling. The residual risk pool intended to afford coverage to employers at high risk in terms of workers' compensation losses was rapidly expanding to include more and more employers. At the same time injustice was observed in that residual risk employers did not pay the full cost of their insurance. Risk pool losses were passed onto the voluntary market through a mechanism known as residual risk pool loading. The ability of the Department of Workers' Claims to monitor self-insured employers was questioned as a result of the bankruptcy of Southeast Coal. That much publicized failure raised the disasterous prospect that scores of disabled miners might not be paid their workers' compensation awards. Moreover, the haunting specter of huge Special Fund liability hung over the session.

Funding crises in the program are not of recent advent. In 1986, actuaries pronounced that the Special Fund (Kentucky's version of a second injury fund) had accrued an unfunded liability of approximately $1.75 billion. A task force was appointed to analyze funding issues and make recommendations to the General Assembly. With task force suggestions in hand the legislature met in an extraordinary session in October of 1987 and adopted House Bill 1 (another so called "Workers' Compensation Reform Act").

The focus of that legislation was to place the Special Fund on a "pay as you go" basis. Quite inconsistently, unfunded liability was to be reduced to zero over a period

of thirty years. The primary means of achieving that goal was revamping the "black lung" provisions of the Act. Part and parcel of the 1987 bill was an effort to salvage the Commonwealth's coal industry which was ravaged by the financial impact of extensive environmental regulation, competition from more economically minable western coal, and an escalating number of awards of total disability benefits to miners afflicted with early coal workers' pneumoconiosis (CWP). A tier system was devised for black lung awards whereby miners exhibiting category 1 CWP on x-ray, but not having cognizable pulmonary dysfunction, were granted retraining incentive benefits (RIB). The RIB award entailed payment for 50% occupational disability over 208 weeks. Theoretically, the social underpinning of the RIB award was that miners should be afforded the opportunity to obtain vocational training to facilitate employment outside of the coal industry. Practice and theory departed paths as the legislature failed to include any provision mandating that the award actually be expended for retraining. *Eastern Coal Corp.* v. *Blankenship*, KY 813 SW2d 808 (1991).

Bonanza years ensued for coal field workers' compensation practitioners following the 1987 Reform. RIB claims ballooned from 23 in 1989 to 2,183 in 1993. Contemporaneously, the volume of contested injury claims skyrocketed and reopenings under the more liberal 1987 version of KRS 342.125 soared. Coincidentally perhaps, the day of the TV lawyer dawned. (See DWC graph Appendix 1).

Thereafter, a portrait of injustice within the workers' compensation system was widely disseminated by the media which togged the RIB award as the "bass boat" or "pick-up truck" award. Approximately one-half of the miners who received the award continued to labor in the coal industry. The fundamental purpose of workers' compensation was not served as in most cases the monetary award would be expended before the coal miner encountered a loss of employment due to the symptoms of CWP.

Thus, in 1994 all climatic elements were present to produce far reaching changes in the workers' compensation law. There was dissatisfaction with the administration of the program, a communal sense that the designated beneficiaries (workers) were under served while the bar and medical providers were overpaid, that employers paid too much, and generally that the workers' compensation program rested upon a financial bubble ready to burst.

As of today, Kentucky is almost exactly one year into workers' compensation reform. A report card indicating an A for reduction of employer premiums and an A+ for expediting the delivery of benefits to injured workers would be laudable. However, reform is not fully implemented: data is incomplete; and, the jury is still in chambers.

Bad news for employers is that we have found no decrease in premiums in the voluntary market. This is so not because reform has failed its promise, but rather because carriers have not completed their rate filing for 1995. Some experts project that a decrease in workers' compensation premium rates will take place as insurance carriers fight for market share contemporaneously with the start-up of the new competitive state fund, Employers Mutual Insurance Authority on September 1, 1995. The beefed up self-insurance branch of the Department of Workers' Claims has noted increased competition for business among Kentucky's present contingent of sixteen self-insurance groups. For those employers willing to bite off on joint and several liability there has been a moderate decrease in rates. Cherry picking by self-insurance group funds has occurred, thereby extracting a significant number of employers from the residual risk pool.

Reorganization of the administrative structure of the Department has brought changes generally benefiting the bar. A reconstituted Workers' Compensation Board, free of administrative responsibilities, has energetically addressed the backlog of undecided appeals of decisions from the administrative law judges. With a sense of urgency approaching passion, the Board is issuing record numbers

of opinions each month. (See Appendix 2). That has expedited the delivery of benefits of Kentucky's workers. But, at the same time the number of concluded claims will skew financial ledgers for claims paid in 1994.

New resources and oversight have been committed to first line adjudications by our ALJs. The Office of Chief Administrative Law Judge lends a management arm to the adjudicaton process and brings in-house a voice acutely familiar with the program concerns of the ALJ's and practicing bar. Dedication of a paralegal to each administrative law judges office has boosted their production of written opinions, yet, much remains to be done. (See Appendix 3). Further relief for the maximally burdened ALJs has come through mediation by ombudsmen of many disputes appearing upon the medical docket. Additional aid will be forthcoming with a pilot project entailing early mediation of disputed claims.

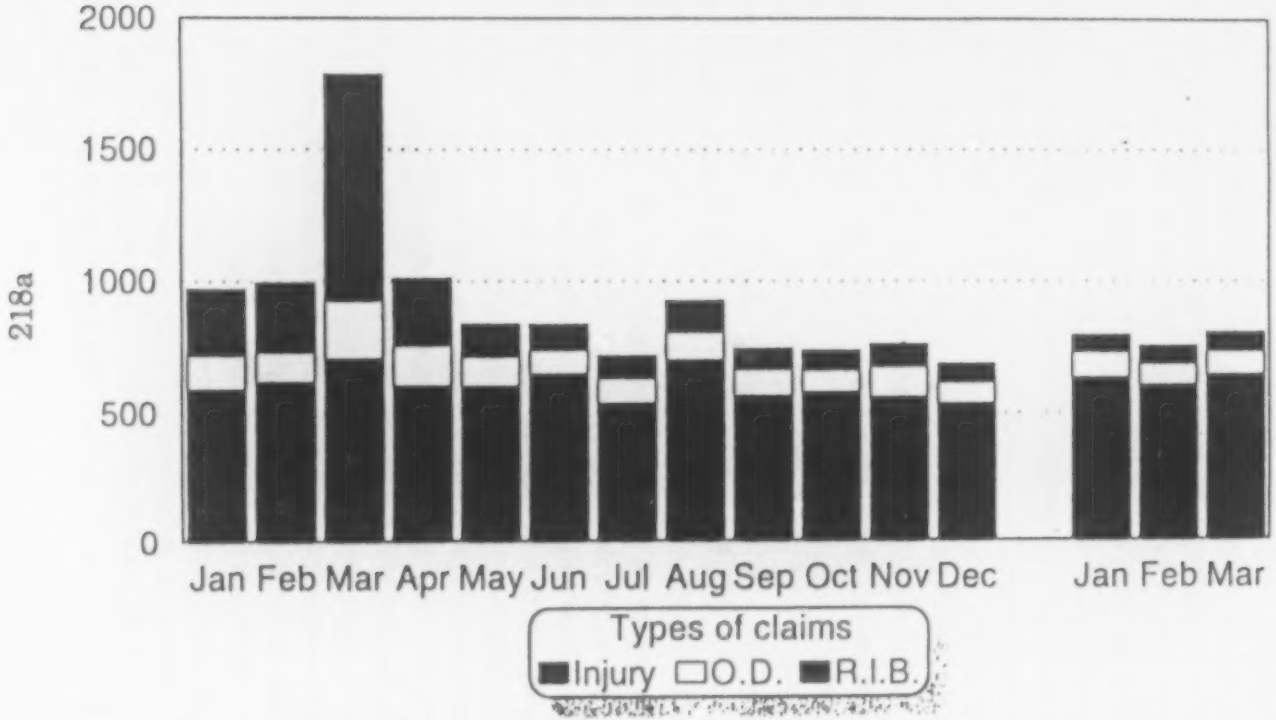
Medically, we have marched miles, yet, haven't moved an inch. Regulations establishing the standards by which managed care systems may obtain approval to furnish industrial medicine in Kentucky were promulgated in July of 1994. The self-insured community immediately pursued the opportunity of limited provider choice through contractual arrangements with approved managed care plans. However, despite the hue and cry from the insurance industry which proceeded the 1994 legislative session relative to the necessity of offering managed care and its attendant restrictions upon provider choice, carriers have to date refused to surrender administrative dollars and medical oversight to managed care plans. They have stubbornly adhered to the failed practices of the past in terms of adjustor claims control through the power of the purse. Likewise, savings attributable to medical fee schedules adopted in July of 1994 have yet to trickle down to Kentucky employers.

Claims for injuries and last exposures occurring prior to April 4, 1994 are now filtering into our adjudication system. The success of the 1994 Reform is not quantifi-

able until those claims have been resolved. Thus, we are approximately one year out from accumulating the data to necessary to adjudge the effectiveness of House Bill 928 in doing that which it was designed to do. KBA President Stephen Wolnitzek has pronounced that the theme of this year annual convention is "Justice . . . Not Just a Word." Members of the bar have a monumental stake in the workers' compensation program — in 1994 $41 million in attorney's fees were approved by our ALJs for counsel who represented plaintiffs. I leave you with this thought which might be unsettling to our interests. Justice in workers' compensation is not hitting a home run on a contested claim with equivocal medical evidence. Justice in workers' compensation is the immediate delivery of disability benefits and reasonably necessary medical services to a worker whose earning power is severed or significantly diminished by an industrial event. The benevolent purpose of the Workers' Compensation Act will be achieved only when members of the bar measure their success with less emphasis on the amount of money derived from the system. Your essential function should be to guide clients through the system, obtaining for them equitable treatment along the way.

Number of claims filed per month by type

January, 1994 to March, 1995

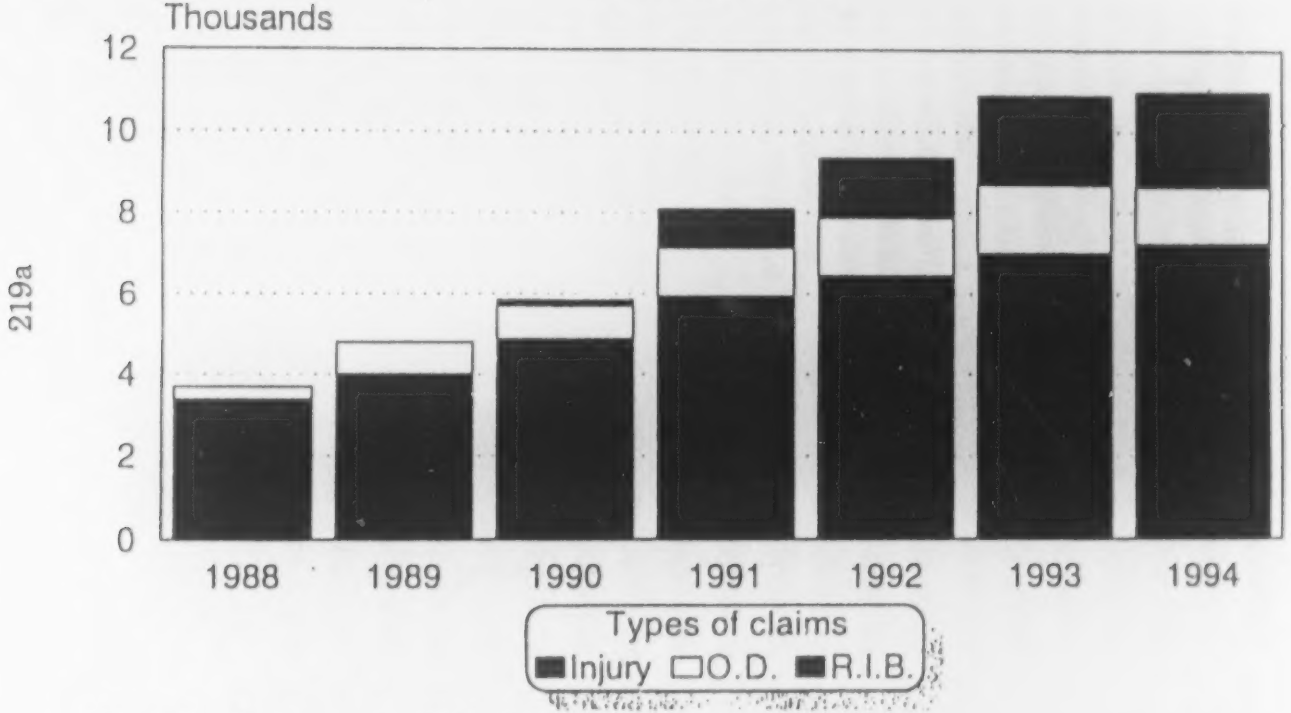


218a

Kentucky Department of Workers' Claims
Prepared 03/08/95

Number of claims filed by type

1988-1994

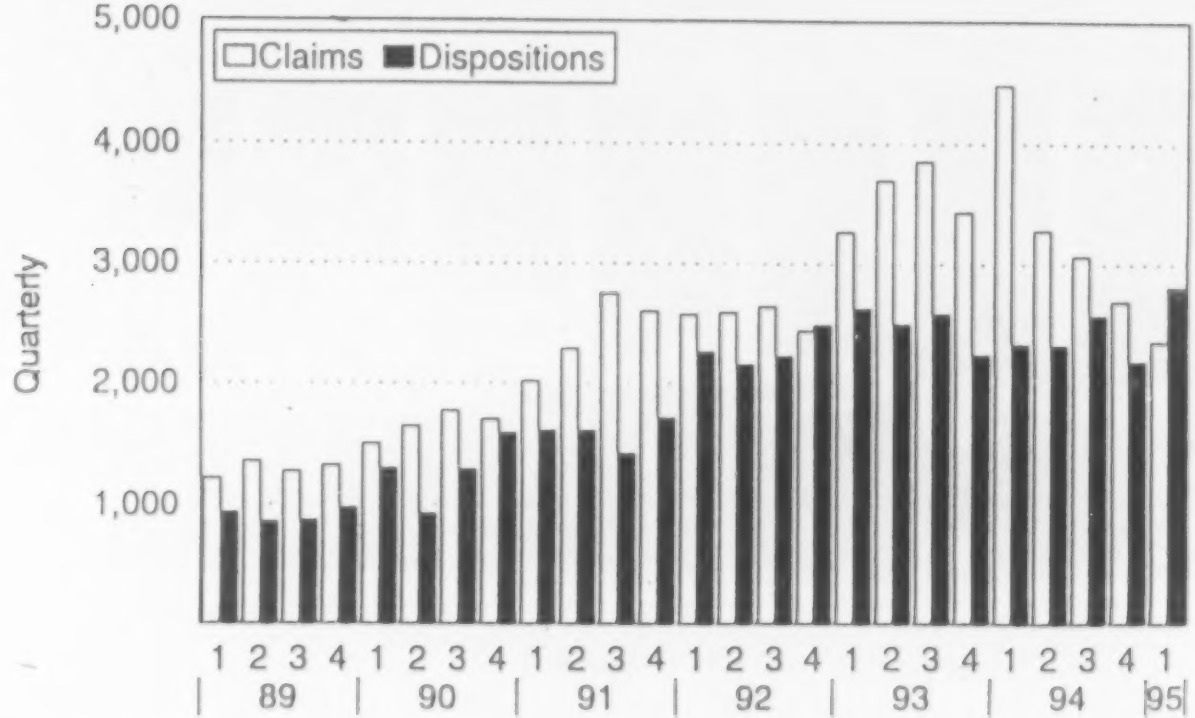


219a

Kentucky Department of Workers' Claims
Prepared 02/07/95

Claims vs Dispositions

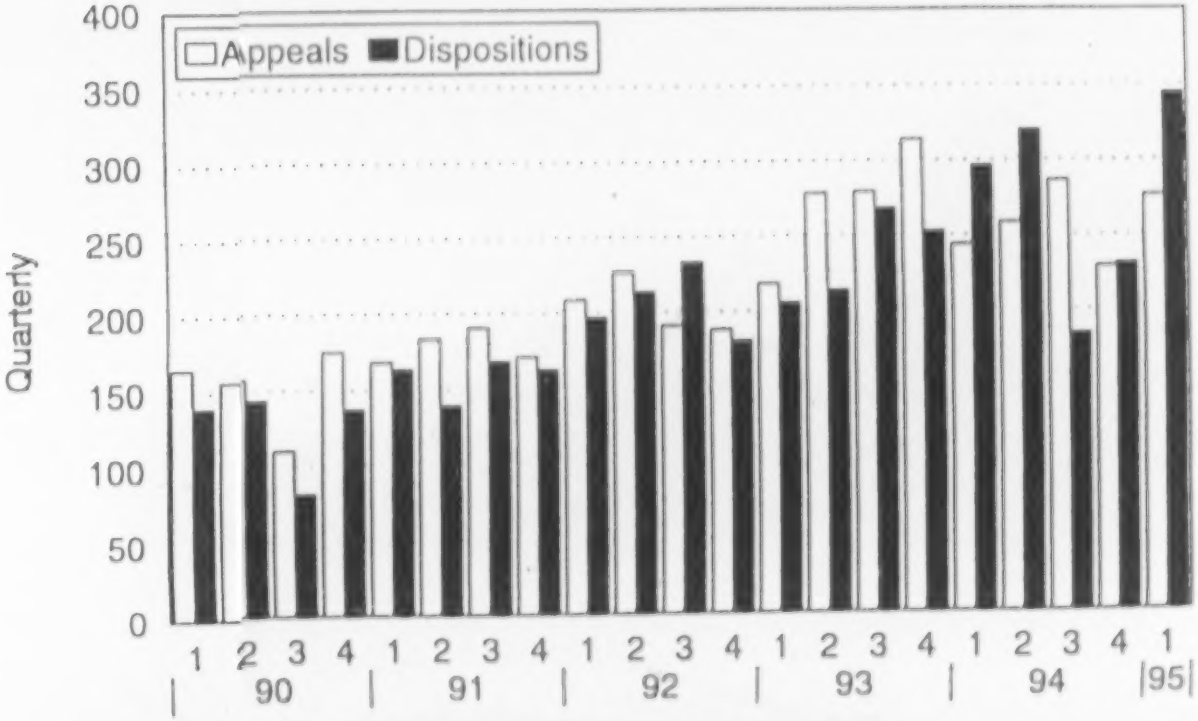
First Quarter, 1989 to First Quarter, 1995



Kentucky Department of Workers' Claims, Prepared 04/28/95

Appeals vs Dispositions

First Quarter, 1990 to First Quarter, 1995



Kentucky Department of Workers' Claims, Prepared 04/28/95